Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

FLORIDA ROCK INDUSTRIES, INC.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether just compensation is required under the Fifth Amendment with respect to property which, by virtue of the imposition of federal wetlands regulation, has lost all viable economic use, but retains a residual "value" based on possible resale to a speculator.

LIST OF PARTIES TO THE PROCEEDING BELOW

The caption of the case in this Court contains the names of all parties to the appeal to the United States Court of Appeals for the Federal Circuit.

RULE 29.1 LISTING

Petitioner Florida Rock Industries, Inc. has no parent companies or nonwholly owned subsidiaries.

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No. _____

In The

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October Term, 1994

FLORIDA ROCK INDUSTRIES, INC.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

Florida Rock Industries, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at 18 F.3d 1560 (Fed. Cir. 1994) (App. 1-52). The orders of the Court of Appeals denying cross-petitions for rehearing and denying cross-suggestions for rehearing in banc are not reported. (App.

53-54, 55-56). The opinion of the United States Claims Court is reported at 21 Cl.Ct.161 (1990) (App. 57-91).

The previous opinion of the Court of Appeals for the Federal Circuit is reported at 791 F.2d 893 (Fed. Cir. 1986) (App. 92-121). Certiorari was denied by The United States Supreme Court, as is reported at 479 U.S. 1053 (1987). The previous opinion of the United States Claims Court on liability is reported at 8 Cl.Ct. 160 (1985) (App. 122-165); the Claims Court's order on valuation, entered following the trial on damages, is not reported. (App. 166-167).

STATEMENT OF JURISDICTION

Petitioner seeks review from decision of the United States Court of Appeals for the Federal Circuit on March 10, 1994. (App. 1-52). The cross-petitions for rehearing were denied June 21, 1994 (App. 53, 55), and the cross-suggestions for rehearing in banc were denied June 21, 1994. (App. 53, 55). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

> "nor shall private property be taken for public use, without just compensation."

Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (as amended):

> *"Permits for dredged or fill material.*

(a) Discharge into navigable waters at specified disposal sites.

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection."

* * *

"(c) Denial or restriction of use of defined areas as disposal sites.

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection."

33 U.S.C. § 1344(a) & (c).

STATEMENT OF THE CASE

This is a suit seeking just compensation from the United States under the Fifth Amendment for a regulatory taking. Petitioner, Florida Rock Industries, Inc. ("Florida Rock") brought suit in the United States Court of Claims[1] pursuant to the Tucker Act, 28 U.S.C. § 1491, following denial by the United States Army Corps of Engineers of a Clean Water Act permit, 33 U.S.C. § 1344, to dredge and fill wetlands in connection with the extraction of limestone.

A. The Property

In March 1972, Florida Rock, a company engaged in mining, processing, and sale of crushed stone and aggregates for use in construction, purchased a 1,560 acre tract in western Dade County, Florida, where large underground deposits of limestone exist and mining is common. (App. 94-95, 124). Florida Rock had all of the necessary state and local permits or waivers to operate a limestone quarry, and at the time, no federal statutes or regulations applied. (App. 95, 125).

Subsequent to Florida Rock's purchase of the subject property, Congress amended the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and the Army Corps of Engineers

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[1] Subsequent to the filing of Florida Rock's Petition, the Federal Courts Improvement Act of 1982, Pub.L. No. 97-164, 96 Stat. 25 (1982), changed the name of the United States Court of Claims to the United States Claims Court. In 1992, the Federal Courts Administration Act of 1992, Pub.L. No. 102-572, 106 Stat. 4506 (1992), changed the name of the United States Claims Court to the United States Court of Federal Claims.

was granted expanded jurisdiction to issue permits to discharge dredged or fill materials into "navigable waters." 33 U.S.C. § 1344. (App. 5, 125). In 1977, the Corps issued regulations extending its permit jurisdiction to wetlands such as those which exist in this subject property. (App. 5, 125)[2]

Following a slump in the construction industry, Florida Rock first sought to commence mining in 1978, unaware of the Corps' recently acquired jurisdiction over its property. (App. 125-126). On October 2, 1980, the Corps denied Florida Rock's dredge and fill permit application to mine 98 acres because the proposed mining would cause irremedial loss of a valuable wetlands parcel. The Corps concluded that the discharge of rock and sand into the water would not be a menace to the drinking water, but would cause temporary turbidity.[3] (App. 5, 59, 66, 96-97, 103). The government's stated policy interest in denying the permit was the prevention of development in the vast wetlands area at the western edge of Dade County. (App. 66, 163 n.23).

B. Proceedings Below

Alleging that there were no viable economic uses that could be made of its land without a dredge and fill

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[2] *See generally United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123-24 (1985).

[3] After removal of all limestone, the parcel would consist mostly of a deep lake or pond, which would be environmentally harmless, but would not retain the attributes of "wetlands." (App. 97).

permit, and that the United States had in effect imposed a "preservation easement"on the area in question, Florida Rock filed suit in the United States Court of Claims in 1982, asserting that the denial of the permit constituted a regulatory taking of its property under the Fifth Amendment. (Petition, App. 168-177).

The Claims Court, through then Chief Judge Alex Kozinski, held, following a trial, that any other economically viable use, such as residential construction or commercial activity, would more dramatically affect the wetlands than rock mining, making it "unthinkable that the Corps would issue such a permit in light of its denial of [Florida Rock's] application." (App. 127). As such, the government's action deprived Florida Rock of all economically viable use of the property resulting in a taking requiring just compensation. (*Id.*).

The Federal Circuit reversed and held that a regulation which deprives an owner of all "allowable and practicable immediate use" of the property, (App. 111), nevertheless does not constitute a taking under the Fifth Amendment where the property retains a "fair market value" based on possible sales to investors who "bet" that the very regulation upon which the taking claim is premised might in the future be altered. (App. 112-116). The Federal Circuit remanded the case for a determination of fair market value of the tract after the alleged taking (App. 121) based upon the existence of a "real market" of "well-informed 'willing buyer[s]' " willing to "bet that the prohibition of rock mining, to protect the overlying wetlands, would some day be lifted." (App. 113).

Following a second trial, the Claims Court again held that the Corps of Engineers' denial of a permit constituted a taking and awarded just compensation under the Fifth Amendment. (App. 90). Present Chief Judge Loren Smith, on the basis of conflicting factual and expert testimony, concluded that there was no market among "real and knowledgeable investors aware of all restrictions on the lands," (App. 75), and that the highest and best use of the site was for " 'future recreational/water management' " at a nominal value of $500 per acre. (App. 79, 87 & n.10). Thus, the court awarded as just compensation $1,029,000 for the 98-acre tract (the difference between $10,500 an acre pre-regulation and $500 per acre after). (App. 90).

On appeal, the Federal Circuit again reversed the taking determination holding that the trial court erred in accepting evidence that the buyers in this market were without knowledge of the restrictions imposed by the Clean Water Act. (App. 13-14, 15). Instead, the Federal Circuit *presumed* that the "willing buyer[s]" upon whom the government expert based his appraisal had " 'all knowledge of legal restrictions,' " (App. 14 n.12), and concluded that "there was an active though speculative investment market for Florida Rock's land at the time of and following the permit denial." (App. 15). As such, the Clean Water Act regulation did not categorically prohibit all economically beneficial use of the land, (App. 10-11, 30, 32), but instead caused only a "partial destruction of its value." (App. 11). The Federal Circuit again remanded this case back to the Court of Federal Claims, for yet a third trial on liability (App. 19 n.15), to resolve "when a partial loss of economic use of the property has

crossed the line from a noncompensable 'mere diminution' to a compensable 'partial taking.' " (App. 25).[4]

REASONS FOR GRANTING THE PETITION

With this case, the Court has a clear, unimpeded, and direct opportunity to guide property owners, government land-use regulators, and courts on the proper application of the Fifth Amendment's guarantee of just compensation for a regulatory taking of private property. The important constitutional issue presented here is clear-cut and squarely presented. The facts are extensively developed, with evidence from two trials bearing on the question of the extent to which denial of a Clean Water Act permit to dredge and fill wetlands has prevented all economically viable uses of Florida Rock's property and frustrated reasonable investment-backed expectations.

The Federal Circuit's decision directly conflicts with the Court's holding in *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2894-95 (1992), that full compensation is required by the Fifth Amendment for a categorical taking where the government has deprived a landowner of all economically beneficial uses by requiring land to be left substantially in its natural state.

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[4] Admitting that the trial court "will find itself with little direct case law guidance," (App. 25), the Federal Circuit predicted that "[o]ver time, however, enough cases will be decided with sufficient care and clarity that the line will more clearly emerge." (App. 28).

Finally, the decision of the Federal Circuit is likely to create confusion in the area of regulatory taking law, embarking on a new and uncharted course by holding that "partial takings" are compensable at a rate less than the value of the fee, an unprecedented decision, which now stands as binding precedent in all regulatory taking cases involving the federal government. *See Riverside Bayview Homes, Inc.*, 474 U.S. at 128; Tucker Act, 28 U.S.C. § 1491.

For each and all of these reasons, this case is the "right case for the enunciation of takings doctrine." *Dolan v. City of Tigard*, 114 S.Ct. 2309, 2331 (1994) (Souter, J., dissenting).

I. The Federal Circuit's Opinion Rejects the Viable Economic Use Analysis Mandated by this Court.

"[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial *uses* in the name of the common good, that is, to leave his property economically idle, he has suffered a taking," *Lucas*, 112 S.Ct. at 2895 (emphasis added), without regard to whether or not the property owner retained the right to possibly sell the property to third parties. The majority in *Lucas* firmly rejected the argument of the concurring and dissenting justices that no taking occurred because Lucas' ocean front property possibly and theoretically retained some resale value. *See* 112 S.Ct. at 2902-2903, 2908, 2919 n.3, 2925.

Under the Federal Circuit's opinion in *Florida Rock*, the Fifth Amendment has no application where regulated property, with "no allowable and practicable immediate

use," (App. 111), retains any market value, even though that "value" is admittedly based on speculators betting on the prospect that the very regulation which effects a taking will in the future be altered. The Federal Circuit's opinion, which denies Florida Rock compensation merely because of the chance that its regulation-burdened property might be sold to an unknowing speculator, would eviscerate the Fifth Amendment's guarantee that government may not " 'forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123 (1978) (citation omitted).

As aptly stated by Judge Kozinski:

> Common sense suggests that regulatory action will never entirely eliminate the market value of the real property it affects. . . . There are invariably speculators willing to gamble that even the most severe restrictions will eventually be lifted. . . . If the existence of such a residual market for the property could defeat a claim for a regulatory taking, no regulatory taking could ever be proved. . . . (App. 134).

What the Federal Circuit has done is to redefine the economic impact element of this Court's oft-stated three-prong analysis in regulatory taking cases.[5] In determining the economic impact of a regulation, the Court has traditionally focused upon the regulation's impact on the

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[5] *E.g. Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986) (quoting *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

property owner's ability to productively *use* the regulated property.[6] "Of the aggregate rights associated with any

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[6] *Nollan v. California Coastal Commission*, 483 U.S. 825, 835-36 (1987) (denial of a permit to build would constitute a taking if "denial would interfere so drastically with the Nollans' use of their property"); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987) ("'temporary' takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation"); *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 495 & 517 (1987) ("'[a] statute regulating the uses that can be made of property effects a taking if it "denies an owner economically viable use of his land"'") (prohibition of "every use" constitutes a taking "for the owner would still have been 'deprive[d] of all or most of his interest in the subject matter'") (Rehnquist, C.J., dissenting); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 361 (1986) ("'[p]olice power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property'") (White, J., dissenting); *Riverside Bayview Homes, Inc.*, 474 U.S. at 127 ("[o]nly when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred"); *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 14 (1984) ("[w]e have frequently recognized that a radical curtailment of a landowner's freedom to make use of or ability to derive income from his land may give rise to a taking within the meaning of the Fifth Amendment, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property"); *Kaiser Aetna v. United States*, 444 U.S. 164, 174 n.8 (1979) ("'[c]onfiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title'"); *Penn Central Transportation Co.*, 438 U.S. at 133 ("the 'taking' issue in these contexts is resolved by focusing on the uses the regulations permit"); *United States v. Dickinson*, 331 U.S. 745, 748 (1947) ("[p]roperty is taken in the constitutional

property interest, the right of use of property is perhaps of the highest order." *Dickman v. Commissioner of Internal Revenue*, 465 U.S. 330, 336 (1984). Indeed, the Court in *Lucas* instructed that

> regulations that leave the owner of land without *economically beneficial or productive* options for its *use* – typically, as here, by requiring land to be left substantially in its natural state – carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm [requiring compensation]. 112 S.Ct. at 2894-95 (emphasis added).

"[W]hen the owner of real property has been called upon to sacrifice *all economically beneficial uses* in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." 112 S.Ct. at 2895 (emphasis added). Thus, "[a]lthough a comparison of values before and after is relevant, . . . it is by no means

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sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired"); *United States v. Causby*, 328 U.S. 256, 261 (1946) ("[i]f, by reason of the frequency and altitude of the flights, [property owners] could not use this land for any purpose, their loss would be complete"); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945) (property denotes "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it"); *Pumpelly v. Green Bay Co.*, 13 Wall (80 U.S.) 166, 179 (1871) ("a serious interruption to the common and necessary use of property may be . . . equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken").

conclusive." *Goldblatt v. Town of Hempstead, N.Y.*, 369 U.S. 590, 594 (1962).

The Federal Circuit, however, has recast the economic impact analysis to one "measured by the change, if any, in the fair market value caused by the regulatory imposition." (App. 17). Then, to compound the error, the Federal Circuit permits a determination of post-regulatory fair market value to be based solely upon sales to speculators betting that the regulation would change without any present indication of doing so,[7] and to persons without knowledge of the restrictions placed upon the land. (App. 14 n.12). The Federal Circuit then somehow extrapolates that a "speculative market" existed for Florida Rock's particular 98-acre tract following permit denial, (App. 15, 16), without any admissible evidence for support.[8]

Thus, where the regulation burdening the property is shown to have eliminated all economically viable uses

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[7] In eminent domain cases, evidence of value based on a use not within a "reasonable possibility" or depending upon "events or combinations of occurrences which, while within the realm of possibility, are not shown to be reasonably probable," is not admissible to inflate the price of property the government is seeking to condemn, "for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value." *Olson v. United States*, 292 U.S. 246, 257 (1934).

[8] The "offers" relied upon by the Federal Circuit to show "value" after imposition of the regulation (App. 7, 12-13) were rejected by the trial court as without any basis. (App. 75 n.7). Moreover, mere unaccepted "offers" for purchase are inadmissible to establish market value. *Sharp v. United States*, 191 U.S. 341 (1903); 4 Nichols, *Eminent Domain* § 12B.04[2] (3d ed.).

now or in the foreseeable future, under the Federal Circuit's holding, the government is relieved of the strictures of the Fifth Amendment solely because the property may retain some "fair market value" to speculators willing to bet on the possibility that the regulations, without any present indication of doing so, will change in the future.

II. The Court Should Grant Certiorari Notwithstanding the Pendency of a Final Judgment.

The significance and far-reaching effect of the decision of the Federal Circuit Court of Appeals, as well as the fully developed record presented herein, should alleviate any concerns the Court may have with finality. Whether the Court may rightfully take jurisdiction of this case where there has been no final decree is a question of power and propriety. *Forsyth v. City of Hammond*, 166 U.S. 506, 511 (1897). That the Court has the power is clearly established. *Forsyth*, 166 U.S. at 511; 28 U.S.C. § 1254(1). It is the nature of the court of appeals' judgment which is relevant to the Court's discretionary assessment of the propriety of immediately reviewing an interlocutory decision.

As a guide in this determination, the Court has held that it may appropriately review an interlocutory order such as the one issued by the Federal Circuit herein, when there is an important and clear-cut issue of law which is fundamental to the further conduct of the case and which would otherwise qualify as a basis for certiorari. *See Michael v. United States*, 454 U.S. 950, 951 (1981) (White, J., dissenting); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153-54 (1964); *Larson v. Domestic &*

Foreign Commerce Corp., 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945).

Particularly instructive and relevant is the eminent domain case of *United States v. General Motors Corp., supra*, in which the Court accepted certiorari from the Court of Appeals' decision which reversed the trial court's determination of "just compensation" under the Fifth Amendment, created its own formula for determining just compensation for the interest which the government condemned, and remanded to the district court for further proceedings in accordance with the Court of Appeals' ruling. Because the case presented an issue of first impression on an important constitutional question of ascertaining "just compensation" required by the Fifth Amendment; because the lower courts were in conflict on the question; and because the ruling was "fundamental to the further conduct of the case," this Court accepted the case on certiorari. 323 U.S. at 374, 377.

Likewise, the decision of the Federal Circuit Court of Appeals here presents a clear-cut constitutional issue of first impression concerning the scope of the economic impact determination in regulatory takings cases, and the creation of the doctrine of "partial takings" by regulation. The Court of Appeals has remanded the case to the trial court for implementation of its new legal theory, with no guidance or instructions. (App. 25, 28).[9] Intervention by

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[9] In 1986, the Federal Circuit remanded this case to the trial court for "determination of the taking question according to right principles," (App. 94), with little guidance or instruction. The United States Claims Court interpreted the Federal Circuit

the Supreme Court at this juncture is necessary to "prevent extraordinary inconvenience," *American Construction Co. v. Jacksonville, T. & K. W. Ry.*, 148 U.S. 372, 384 (1893), cost, and delay to the parties, *Gillespie*, 379 U.S. at 153; eliminate conflict in the law, *see Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 408-409 (1915); and determine for all the reach of the Fifth Amendment's protection of private property owners' rights in the face of government regulation.

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as directing it "to determine whether there existed an actual market among real and knowledgeable investors aware of all restrictions on the land." (App. 77). The Federal Circuit, on appeal, found fault with the Claims Court's interpretation of its mandate (App. 11, 13-14 & n.12, 17), and used that as the basis for reversal and further remand. The Court of Federal Claims is again faced with having to interpret, in its "discretion," (App. 19 n.15), the Federal Circuit's opinion on remand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FLORIDA ROCK INDUSTRIES, INC., Plaintiff-Appellee,

v.

The UNITED STATES, Defendant-Appellant.

No. 91-5156.

United States Court of Appeals, Federal Circuit.

March 10, 1994.

Property owner brought action under Tucker Act, claiming that Army Corps of Engineers' denial of Clean Water Act permit for limestone mining under wetlands amounted to compensable taking. The Claims Court, 8 Cl.Ct. 160, entered judgment in favor of owner, and government appealed. The Court of Appeals, 791 F.2d 893, affirmed in part, vacated in part, and remanded. On remand, the Claims Court, 21 Cl.Ct. 161, again entered judgment in favor of owner, and further awarded owner litigation costs and attorney fees, 23 Cl.Ct. 653. Government appealed. The Court of Appeals, Plager, Circuit Judge, held that: (1) for purposes of determining fair market value, prior decision did not require detailed inquiry into motivation and sophistication of buyers of comparables; (2) evidence did not support finding that all economic use or value of property was taken by regulatory decision; and (3) to determine whether compensable regulatory taking had occurred, Court of Federal Claims would have to undertake balancing of competing interests.

Vacated and remanded.

Nies, Chief Judge, dissented and filed opinion.

John A. DeVault, III, Bedell, Dittmar, DeVault & Pillans, P.A., Jacksonville, FL, argued for plaintiff-appellee. With him on the brief was C. Warren Tripp, Jr., of counsel.

Robert L. Klarquist, Atty., Dept. of Justice, Washington, DC, argued for defendant-appellant. With him on the brief were Barry M. Hartman, Acting Asst. Atty. Gen., Environment & Natural Resources Div., John A. Bryson and Fred R. Disheroon, Attys., Washington, D.C. Also on the brief was Roger B. Clegg, Acting Asst. Atty. Gen., Environment & Natural Resources Div., Washington, DC.

Timothy C. Searchinger, Environmental Defense Fund, of New York City, was on the brief for amicus curiae, The Environmental Defense Fund, Inc., The Nat. Wildlife Federation, Inc.

James S. Burling, Ronald A. Zumbrun and Robin L. Rivett, Pacific Legal Foundation, Sacramento, CA, were on the brief for amicus curiae, Pacific Legal Foundation.

Mary V. Dicrescenzo, Nat. Ass'n of Home Builders, Washington, DC, was on the brief for amicus curiae, The Nat. Ass'n of Home Builders, Nat. Ass'n of Realtors, Intern. Council of Shopping Centers, Nat. Ass'n of Indust. and Office Parks, Nat. Realty Committee, Nat. Multi Housing Council and Florida Home Builders Ass'n. With her on the brief was William H. Ethier, Cohn & Birnbaum, Hartford, CT.

George W. Miller, Walter A. Smith, Jr. and Jonathan L. Abram, Washington, DC, were on the brief for amicus curiae, Whitney Benefits, Inc., Peter Kiewit Sons Co.

Before NIES, Chief Judge, NEWMAN and PLAGER, Circuit Judges.

PLAGER, Circuit Judge.

This is a regulatory taking case. It arose when the plaintiff Florida Rock Industries Inc. (Florida Rock) sought a permit under § 404 of the Clean Water Act[1] from the Army Corps of Engineers (Corps) to mine the limestone which lay beneath a tract of wetlands. The Corps denied the permit on October 5, 1980. On May 25, 1982, Florida Rock filed suit in the United States Court of Federal Claims,[2] seeking monetary compensation from the defendant United States (Government); Florida Rock alleged that the Corps' permit denial constituted an uncompensated taking of private property for public use in violation of the Fifth Amendment.[3] The Court of Federal Claims agreed, *Florida Rock Indus., Inc. v. United States*, 8 Cl.Ct. 160 (1985) (*Florida Rock I*), and awarded Florida Rock $1,029,000 plus attorney fees and simple interest. On appeal, this court vacated the judgment that a taking had occurred and remanded for further consideration. *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893 (Fed.Cir.1986), *cert. denied* 479 U.S. 1053, 107 S.Ct. 926, 93 L.Ed.2d 978 (1987) (*Florida Rock II*). On remand, the Court of Federal Claims found that the permit denial deprived Florida Rock of all value in its land, and so again concluded that there had been a taking and reinstated the

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[1] Pub.L. No. 92-500 § 2, 86 Stat. 884 (Oct. 18, 1972), amending the Federal Water Pollution Control Act (codified as amended at 33 U.S.C. § 1344 (1988)).

[2] The Federal Courts Administration Act of 1992, Pub.L. No. 102-572, § 902, 106 Stat. 4506 (1992), changed the name of the United States Claims Court to the United States Court of Federal Claims.

[3] U.S. CONST. amend. V, cl. 4.

$1,029,000 damages award, this time with compound interest. *Florida Rock Indus., Inc. v. United States,* 21 Cl.Ct. 161 (1990) (*Florida Rock III*). The Government appeals both the damages award and the choice of compound rather than simple interest. We again find it necessary to vacate the judgment that there has been a taking, and remand for further consideration consistent with this opinion.

BACKGROUND

The detailed background of the case is described in the several opinions referred to above as *Florida Rock I-III.* We provide here only a brief overview before proceeding to the heart of the matter: whether the Corps' denial of the § 404 permit effected a regulatory taking, thus requiring the Government to pay just compensation. The answer to that question depends on the impact the regulatory imposition had on the economic use, and hence value, of the property.

In 1972, shortly before the enactment of the Clean Water Act, Florida Rock purchased a 1,560 acre wetlands parcel in Dade County, Florida, to the west of suburban Miami. The purchase price was $2,964,000 (an average of $1,900 per acre).[4] Florida Rock obtained the parcel in

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[4] The average per acre prices, calculated on the overall value of the 1,560 acre parcel, are provided here only to permit rough comparison with other figures in the record for the 98 acre parcel at issue. The per acre value of the 98 acre parcel may differ significantly from the per acre value of the 1,560 acre tract; testimony in the record indicates that the market value of the land is highly dependent on the size of the parcel offered

order to extract the underlying limestone – a process which destroys the surface wetlands.

During the 1970s, however, the ecological importance of wetlands was increasingly appreciated. The Corps in 1977 enacted regulations requiring owners of wetlands parcels to obtain permits under § 404 of the Clean Water Act before engaging in dredging or filling activities. *See generally United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123-24, 106 S.Ct. 455, 457, 88 L.Ed.2d 419 (1985). Not long after, Florida Rock began mining operations on the parcel, without having applied for a § 404 permit. The Corps issued a cease and desist order on September 7, 1978. Florida Rock stopped mining, restored the area as best it could, and began negotiating with the Corps for the permit.

Initially, Florida Rock sought a permit for the entire 1,560 acres. The Corps responded that permits would be issued only for parcels of a size to suffice for three years of mining; in Florida Rock's case, 98 acres would serve its anticipated needs for three years. Florida Rock acquiesced in the Corps' demand and applied for a permit covering only the 98 acre parcel at issue here. After considering the revised application, the Corps concluded that the proposed mining would cause irremediable loss of an ecologically valuable wetland parcel and would create undesirable water turbidity. The permit application was denied on October 2, 1980.

(the larger the parcel, the lower the per acre price), and on the location of the parcel relative to the existing roads.

Florida Rock, conceding the validity of the Corps' actions,[5] filed suit in the United States Court of Federal Claims, alleging that the permit denial was an uncompensated regulatory taking of its land. In *Florida Rock I*, the Court of Federal Claims found that the value of the parcel before the taking was $10,500 per acre and that the value after the taking was negligible because rock mining – in the view of the court, the *only* viable economic use – had been foreclosed. *Florida Rock I*, 8 Cl.Ct. at 164 (citing *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 295-96, 101 S.Ct. 2352, 2370, 69 L.Ed.2d 1 (1981)). The Court of Federal Claims concluded that the permit denial was a regulatory taking, for which the landowner must be compensated. *Florida Rock I*, 8 Cl.Ct. at 165.

On appeal to this court, that judgment was vacated in *Florida Rock II*. The Federal Circuit held that the Court of Federal Claims in determining the after-taking value of the affected property had erred in focusing on *immediate* use – the proper focus should instead have been on a determination of "fair market value." *Id.*, 791 F.2d at 903. The case was remanded to the Court of Federal Claims for further proceedings.

On remand, the Court of Federal Claims entertained evidence seeking to establish the fair market value of the

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[5] Florida Rock chose not to avail itself of the mechanism provided by the Administrative Procedure Act, 5 U.S.C. § 706 (1988), for challenging in District Court the validity of the Corps' refusal to entertain an application for the entire 1,560 acre parcel and subsequent denial of the permit application for the 98 acre parcel.

property subsequent to the permit denial. The Government presented two assessors, Mr. Slack and Mr. Cantwell, who had investigated contemporaneous land sales in the area. Using the standard comparable sales valuation method, one assessor concluded that the property had a fair market value of $4,000 per acre, while the other found a value of $4,615 per acre. In addition, Florida Rock had received actual purchase offers in the range of $4,000 per acre. The President of Florida Rock Industries, Mr. Edward Baker, testified that he believed the property to be worth $10,000 per acre, even *after* the Corps' permit denial (thus presumably explaining why all such purchase offers were declined).

Finally, the Government presented a state court opinion which had affirmed the state's tax assessment of $4,089,950 for the 1,560 acre parcel, based on comparable sales of nearby parcels during the 1979-1982 time period. (This assessment figure for the larger parcel reflects an average value of $2,621.76 per acre; *see supra* note 3.) *Florida Rock Indus., Inc., v. Bystrom*, 485 So.2d 442, 444-45 (Fla.App.1986), *review denied*, 492 So.2d 1332 (1986) (*Bystrom*). That assessment was based on comparable sales which presumably reflected the market's evaluation of present and future land use restrictions. *Id.* at 444 and 447.[6]

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[6] The admissibility and significance of this state court decision was a matter of heated dispute between the parties, both at trial and on appeal. The Government argued that, under the doctrine of nonmutual defensive collateral estoppel (citing *United States v. Mendoza*, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984)), *Bystrom* was conclusive on the question of the fair market value of the property, and, given the value of the property thus established, there could be no taking. Florida Rock

Florida Rock, on the other hand, read *Florida Rock II* to require a detailed inquiry into the motivations and sophistication of buyers of the comparable properties upon which assessment was based. It crafted a survey – viewed by the Court of Federal Claims to be "admittedly novel," *Florida Rock III*, 21 Cl.Ct. at 173 – and concluded that virtually all the buyers of the comparable properties were lacking in sufficient knowledge in order for their purchases to qualify as truly comparable sales. Florida Rock's assessor, Mr. Failla, used the results of this survey to justify discarding evidence that the average retail price of parcels in the vicinity of Florida Rock's land was

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argued that the Court of Federal Claims was not bound by holdings in a state tax assessment case, and that the general rule that property tax assessments are not admissible as evidence of fair market value in a condemnation proceeding (citing *Miller v. United States*, 223 Ct.Cl. 352, 620 F.2d 812 (Ct.Cl.1980)) was fully applicable. The trial judge agreed with Florida Rock, and concluded that, since valuation for purposes of state taxation and valuation for purposes of determining a taking under the Fifth Amendment are not identical issues, the court was not bound by the *Bystrom* court's findings on that issue.

We find no error in the trial judge's conclusion that the value placed on the property in the tax case should not be determinative of the fair market value for takings purposes. As we explain below, it is not the tax assessor's valuation which is at issue here, but whether there was a market from which a fair value could be established. At the very least, however, this judicial proceeding provides a thorough review of several real estate assessors' analyses of the fair market value at the relevant time, and provides the Court of Federal Claims with a judicial determination based on a high degree of familiarity with the Florida real estate market. As such, it is admissible and persuasive in support of the Government's argument that the 98 acre parcel retained more than nominal fair market value after denial of the permit.

$6,100 per acre, and concluded that the actual fair market value of the tract following the permit denial was negligible. Implicit in this result is the assumption that no one with full knowledge of the regulatory regime would be willing to gamble that concern for the ecological importance of the wetlands would give way in the future to the economics of development pressure from nearby Miami. The Court of Federal Claims in *Florida Rock III* agreed with Florida Rock's view of the matter, and decided accordingly.

DISCUSSION

A.

How to determine whether a regulatory taking under the Fifth Amendment has occurred is a subject of ongoing debate.[7] The Supreme Court has provided various

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[7] The literature is extensive; readers conversant with the field will be familiar with much of it. Among symposia and significant individual contributions in the last year are: Richard Ausness, *Wild Dunes and Serbonian Bogs: The Impact of the Lucas Decision on Shoreline Protection Programs* 70 Denv.U.L.Rev. 437 (1993); *Catholic University Law Review: United States Court of Federal Claims Symposium*, Cath.U.L.Rev. 717 (contributions by James E. Brookshire, Dennis J. Coyle, John A. Humbach, Glynn S. Lunney, Jr., George W. Miller & Jonathan Abram, and Loren A. Smith) (1993); David Mandelker, *Of Mice and Missiles: A True Account of Lucas v. South Carolina Coastal Council*, 8 J. Land Use & Envtl. L. 285 (1993). *Northwestern School of Law of Lewis and Clark College: A Colloquium on Lucas*, 23 Envtl. L. 869 (contributions by Michael C. Blumm, William Funk, James L. Huffman, Donald Large, Edward Sullivan, and Lawrence Waters) (1993); Jed Rubenfeld, *Usings*, 102 Yale L.J. 1077 (1993) *Stanford Law Review: Symposium on Lucas v. South Carolina Coastal Council*, 45

articulations, influenced, as could be expected, by the particular circumstances of the cases before it. One formula that has emerged and has been repeated in several cases requires that the court balance several pragmatic considerations in making its regulatory takings determination. These considerations include: the economic impact of the regulation on the claimant, the extent to which the regulation interferes with investment-backed expectations, and the character of the Government action. (The leading case is *Penn. Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978) (*Penn Central*)). In this appeal, it is the economic impact of the regulation that is at issue.[8]

The recent Supreme Court decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (*Lucas*), teaches that the economic impact factor alone may be determinative; in some circumstances, no balancing of factors is required. If a regulation categorically prohibits *all* economically beneficial use of land – destroying its economic value for private ownership – the regulation has an effect equivalent to a

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Stan.L.Rev. 1369 (contributions by Richard Epstein, William W. Fisher, Richard Lazarus, and Joseph L. Sax) (1993); *Windfalls and Wipeouts: Environmental Regulation, Property, and the 'Takings' Clause after Lucas v. South Carolina Coastal Council*, 17 Vt.L.Rev. 645 (1993); Walker, *Common Law Rules and Land Use Regulations: Lucas and Future Takings Jurisprudence*, 3 Seton Hall Const.L.J. 3 (1993).

[8] For a discussion of the various formulas, and a consideration of the mix of 'categorical' or 'per se' rules and 'balancing' rules, *see* Mandelker, *supra* n. 7.

permanent physical occupation.[9] There is, without more, a compensable taking.[10]

If, however, a regulation prohibits less than all economically beneficial use of the land and causes at most a partial destruction of its value, the case does not come within the Supreme Court's 'categorical' taking rule. As we explain below, we reject the trial court's analysis that led to its conclusion that all economically beneficial use of the land was taken by the Government. We remand for determination of what economic use as measured by market value, if any, remained after the permit denial, and for consideration of whether, in light of the properly assessed value of the land, Florida Rock has a valid takings claim.

B.

In *Florida Rock II* this court stated that, with regard to the property at issue, although "there may be a question what knowledgeable buyers would have paid, but that they would have paid some substantial figure seems certain." *Id.*, 791 F.2d 893 at 903. The trial court on remand was instructed: "if there is found to exist a solid and

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[9] *See Hendler v. United States*, 952 F.2d 1364 (1991), for a discussion of the legal and historical interplay between physical and regulatory takings.

[10] *Lucas*, however, gives the government a defense based on nuisance limitations that inhere in the owner's title. 505 U.S. ___, at ___, 112 S.Ct. 2886, at 2900. A nuisance defense, by definition, incorporates a degree of balancing.

adequate fair market value (for the 98 acres) which Florida Rock could have obtained from others for that property, that would be a sufficient remaining use of the property to forestall a determination that a taking had occurred or that any just compensation had to be paid by the government." *Id.* We did not discuss what residual fair market value would be "adequate" to forestall a taking determination.

We did explicitly indicate that the Court of Federal Claims should give consideration to "a relevant market made up of investors who are real but are *speculating* in whole or major part." *Florida Rock II*, 791 F.2d at 903 (citing *Bystrom*, 485 So.2d at 447; emphasis added). The court noted the testimony of the Government's assessor, Mr. Cantwell, and said:

> We are of the opinion that Mr. Cantwell's testimony, if considered and believed, established the existence of a market in which Florida Rock could have disposed of the property and mitigated the severity of the regulatory action here involved.

Id. And while the court stated that "we take it for granted, as Mr. Cantwell did, that the 'willing buyer' of the market value formula has got to be one who is correctly informed about the physical character of the land, as well as legal restrictions on its use . . . " *id.* at 902, we also indicated that the market as a whole was not dominated by persons engaged in fraudulent or illegal behavior:

> Since the tract was not listed for sale, the $4,000 per acre offer, the frequent inquiries, and the

> assessed value, must have reflected interest of knowledgeable people, not foreigners or gulls.[11]

Id. In short, we understand *Florida Rock II* to hold that purchases which are made by market speculators as well as home builders and other developers are comparable sales, with the caveat that particular sales might be discarded by the assessor if those sales appear questionable in light of the market as a whole.

Florida Rock, and the Court of Federal Claims on remand in *Florida Rock III*, read *Florida Rock II* differently. Our passing reference to buyers being "correctly informed" was read to require a detailed inquiry into the motivation and sophistication of the buyers whose purchases comprised the comparable sales used in the fair market value assessment. The Court of Federal Claims rejected the testimony of Mr. Cantwell – the same testimony which we had noted with approval in *Florida Rock II* – solely because Mr. Cantwell, with little exception, assumed sufficient knowledge on the part of the purchasers. *Florida Rock II*, 21 Cl.Ct. at 172. Instead, the court accepted the testimony of Florida Rock's assessor, who rejected *all* of the comparable sales values on the principle that none of the purchasers were sufficiently sophisticated and knowledgeable. That was error – contrary to our instruction in *Florida Rock II*, contrary to generally

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[11] Since state law generally does not preclude foreigners from owning land, and since there is no established meaning to the term 'gulls' (other than among ornithologists), we understand this reference to be to the law governing fraudulent and illegal land sales and to persons generally protected by that law.

accepted understandings of market valuation, and finally, contrary to the working assumptions of a free market.[12]

There is no disagreement as to the facts regarding the existence and nature of the market. Florida Rock's study identified in the immediate vicinity of the 98 acre tract 240 land sales during the period 1971 through 1987. A significant number of those sales occurred in the early 1980s, despite the intervening change in the regulatory environment. The average sales price per acre in 1980 was $6,100. The price per acre varied predominantly as a function of the overall lot size; smaller lots commanded higher per acre prices. Florida Rock's survey indicated that roughly 80% of the buyers had purchased the land

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[12] The Court of Federal Claims acknowledged that "[u]sually, it may be adequate to presume all knowledge of legal restrictions on the part of purchasers in arms-length transactions." *Florida Rock III*, 21 Cl.Ct. at 173. We agree; *Florida Rock II* did not require more. It is true that there is a statement in *Florida Rock II* – that a willing buyer is one who is 'correctly informed' about the legal restrictions on the use of the land – that, taken in isolation and as a blanket requirement, is not a correct statement of law. The market from which a fair market value may be ascertained need not contain only legally trained (or advised) persons who fully investigate current land use regulations; ignorance of the law is every buyer's right. It is also true that it was this statement that gave Florida Rock's lawyers a crack through which they attempted to drive their novel approach to what constitutes a fair market. And it was the trial judge's acceptance of this approach that requires today's reversal. When read as a whole, however, the opinion in *Florida Rock II* does not support such a novel approach to the well-established concept of a willing buyer. The opinion clearly focussed the issue on the central question: the fair market value before and after the imposition of the regulatory restraint, and the extent of change, if any.

for 'investment' purposes and that, overall, the purchasers intended to hold the land for an average of 9 to 10 years.

Thus, there was an active though speculative investment market for Florida Rock's land at the time of and following the permit denial. *Accord, Bystrom*, 485 So.2d at 447-48. The fair market price which Florida Rock could have commanded at that time remains, still, to be determined, but it was certainly much higher than the nominal $500 per acre value accepted by the Court of Federal Claims.

Florida Rock's survey does indicate that most of the buyers in this market did not have extensive knowledge of the provisions of the Clean Water Act and its impact on the development potential of those properties involving wetlands. It is doubtful that any legal conclusions should be drawn from this. Such broad-based disregard for current land use regulations suggests that, while parties contract in the shadow of the law, long term market trends in real estate values are not necessarily correlated to Government controls. The Government's appraisers testified that detailed knowledge of regulatory constraints was relevant only when the goal of the purchasers was *immediate* development. And as Mr. Slack testified, "there was not really a demand for property this far out [from Miami] at this time. People were not buying it to do anything with it right then anyway."

A speculative market may exist in land that is regulated as well as in land that is not, and the precise content of regulations at any given time may not be particularly important to those active in the market. As this court

observed in *Florida Rock II*, 791 F.2d 893 at 902-03, yesterday's Everglades swamp to be drained as a mosquito haven is today's wetland to be preserved for wildlife and aquifer recharge;[13] who knows what tomorrow's view of public policy will bring, or how the market will respond to it.

We need not decide such speculative questions here. The uncontroverted evidence of an active real estate market compels the conclusion that the typical 'willing buyer-willing seller' requirement of fair market value had been met; it would be inappropriate for a court to substitute its own judgment of value for that of the market. While an assessor might be justified in adjusting the fair market value figure by discarding aberrational values based upon sales between related entities or fraudulent sales to widows and orphans, an assessor may not discard an *entire* market as aberrational.[14] 'Aberrational' means outside the norm established

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[13] *See* F.E. Maloney, S.J. Plager, and F.N. Baldwin, *Water Law and Administration – The Florida Experience* 141-45 (1968) for a discussion of the hydrologic cycle and the inter-relationship between wetlands and the recharge of ground water acquifiers, the major source of public water supplies in Florida.

[14] Florida Rock did not introduce evidence that the market was comprised of illegal or fraudulent sales. However, Florida Rock cites *Johnson v. Davis*, 480 So.2d 625 (Fla.1985), to support their argument that the parcel could not have been sold without committing fraud. *Johnson*, which issued several years after the permit denial, involved defects in the roof of a home which were known to the seller but not disclosed to the buyer; the holding of that case appears to be limited to material facts "which are not readily observable and not known to the buyer." *Id.* at 629. That is quite a different matter from legal restrictions on the subsequent use of the property which are necessarily part of the public record and ascertainable from it.

by general activity. The fact that many players in the market chose to disregard the immediate potential for development in favor of a long-term perspective – hardly unusual behavior in Florida's history of real estate investment – does not make the market as a whole 'aberrational.' When the market provides a well-substantiated value for a property, a court may not substitute its own judgment as to what is a wise investment.

It was error to read *Florida Rock II* as requiring a detailed inquiry into the motivation and sophistication of the buyers of comparable parcels. Dollars are fungible; a speculative market provides a landowner with monetary compensation which is just as satisfactory as that provided by any other market. Should a landowner wish to pick and choose her buyers, that luxury is not chargeable to the federal fisc. To conclude otherwise would be tantamount to concluding that there could never be a market fueled by speculation – a conclusion at odds both with common sense and with our directions in *Florida Rock II.*

C.

Ultimately, the question that must be answered is whether, as a result of the denial of certain economic uses, there was a taking of Florida Rock's property by the Government. This question turns on "the economic impact of the regulation on the claimant," *Penn Central,* 438 U.S. at 124, 98 S.Ct. at 2659, measured by the change, if any, in the fair market value caused by the regulatory imposition. On the state of the record before us we are unable to answer the question. The Court of Federal Claims answered it with a straightforward 'yes' when the

per acre value of the 98 acre parcel after the permit denial was found to be only a nominal $500 per acre, as compared to the $10,500 found by the trial court to be the per acre value prior to the permit denial. This represented a loss in value of roughly 95%. *Florida Rock III*, 21 Cl.Ct. at 1/5. The court in effect treated the permit denial as essentially a 'categorical' taking of all economic use. *See Lucas*, 505 U.S. at ___, 112 S.Ct. at 2893. "The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land." *Id.*

The Court of Federal Claims' analysis was correct in theory, but started from an incorrect premise – that the value of the parcel after denial of the permit was a nominal $500 per acre. When a figure closer to $4,000 per acre is substituted, the correct outcome is no longer clear. On remand, with a fair market value calculated in accordance with this opinion, the Court of Federal Claims must again return to the approach dictated by *Florida Rock II:*

> [T]he court should consider, along with other relevant matters, the relationship of the owner's basis or investment, and the fair market value before the alleged taking to the fair market value after the alleged taking. In determining the severity of the economic impact, the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored.

Id., 791 F.2d at 905.

The Court of Federal Claims must reconsider the assessments proffered by the parties and other evidence

in the record, and determine a fair market value accordingly.[15] Should that determination establish, as the evidence in the record suggests, that there was *some* (but not a total) reduction in the overall market value of plaintiff's property as a result of the regulatory imposition, the question will then be posed: does that reduction constitute a taking of property compensable under the Fifth Amendment?[16]

To answer this question requires the court to resolve two preliminary issues. The first is whether a regulation must destroy a certain proportion of a property's economic use or value in order for a compensable taking of property to occur. The second is how to determine, in any given case, what that proportion is.

Since the Supreme Court's decision in *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922) (*Pennsylvania Coal*), the problem for courts has been to determine the extent to which the Fifth Amendment burdens the exercise of the police power through regulation,[17] that is, to determine when a particular regulation somehow – in the words of Justice Holmes – goes

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[15] We do not by this intend to preclude the taking of additional evidence; that is a matter within the discretion of the Court of Federal Claims.

[16] Because the issue on appeal is the determination of the value of the property as a whole before and after the regulatory imposition, this case does not present the additional difficulties created by parcelling the property interests affected. *Compare Lucas*, 505 U.S. at ___, 112 S.Ct. 2886 at n. 7 with *Penn Central*, 438 U.S. 104 at 130, 98 S.Ct. 2646, at 2662.

[17] The term "police power" is used herein to refer to the power of the federal government to engage in activities not unlike those engaged in by the states under their inherent

"too far," *id.* at 415, 43 S.Ct. at 160, and therefore effects a taking.[18] It is now clear that a regulation that constitutes a total deprivation of economically beneficial use goes "too far;" such a regulatory imposition results in a 'categorical' taking similar to a physical taking of property.[19] *Lucas*, 505 U.S. ___, 112 S.Ct. 2886.

The question remains, does a partial deprivation resulting from a regulatory imposition, that is, a situation in which a regulation deprives the owner of a substantial part but not essentially all of the economic use or value of the property, constitute a partial taking, and is it compensable as such? This question has been much debated in the literature since the Supreme Court's decision announcing that as a general proposition regulatory takings are compensable; the Court's decisions to date have not provided an answer.[20]

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sovereign powers, recognizing that the power in the federal system is of Constitutional origin.

[18] It should be clear that the question in cases such as this is not whether the Government has power to regulate the development of wetlands. While challenges to the Government's power to act through its various agencies are judicially reviewable, *see* 5 U.S.C. § 701 *et seq.*, the Administrative Procedure Act, the question of power to act is not before us. The only question here is, when the Government chooses to act in the manner it did, must it pay the just compensation mandated by the Fifth Amendment.

[19] There is a limited governmental defense to a 'categorical' taking; see note 10, *supra*, and accompanying discussion.

[20] *Lucas*, 505 U.S. ___, n. 7, 112 S.Ct. 2886, n. 7 and accompanying text. For recent academic discussion of the problems of partial regulatory takings, *see* Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, *supra* n. 7

Nothing in the language of the Fifth Amendment compels a court to find a taking *only* when the Government divests the total ownership of the property; the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests. In *Lucas*, the Supreme Court touched upon the question of a partial regulatory taking, *see* 112 S.Ct. 2893-95, but, concluding on the facts before it that the case was one in which the owner was called upon "to sacrifice all economically beneficial uses in the name of the common good," *id.* at ___, 112 S.Ct. at 2895, the Court found a categorical taking and thus did not have to decide the partial taking question.[21] *Id.* at ___ n. 9, 112 S.Ct. at 2896 n. 9.

Justice Stevens, writing separately, criticized as arbitrary the notion that "[a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value." *Id.* at ___, 112 S.Ct. at 2919, Stevens, *dissenting*. In response, Justice Scalia, writing for the Court, noted that Justice Stevens's analysis "errs in its assumption that the landowner whose deprivation is one

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(45 Stan.L.Rev. 1369, 1375, 1387-1392, (1993)); Rubenfeld, *supra* n. 7, Part V, Subpart E. "Parceling and Partial Usings."

[21] Similarly, in *Whitney Benefits, Inc. v. U.S.*, 926 F.2d 1169 (Fed.Cir.1991), this court held that the impact of the Surface Mining Control and Reclamation Act of 1977 on plaintiff was a total destruction of all economically viable use; the Government's arguments regarding possible alternative uses, such as farming, were considered "completely off the mark." *Id.*, at 1174.

step short of complete is not entitled to compensation." *Id.* at ___, 112 S.Ct. at 2894 n. 8.[22]

No such conceptual problem seems to exist when the taking is by physical occupation. If a property owner owns a 100 acre tract, and the Government takes 95 acres for a public park, no one would argue that the five acres remaining somehow precludes the property owner from claiming entitlement to just compensation for the loss of the 95. Indeed, if the Government took just 5 acres and left the property owner with 95, there would be no question that the owner was entitled to compensation for the parcel taken (plus severance damages attributable to the remaining tract).[23]

Courts have held that even relatively minor physical occupations are compensable. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982); *Hendler v. United States*, 952 F.2d 1364 (Fed.Cir.1991). Logically, the amount of just compensation should be proportional to the value of the interest taken as compared to the total value of the property, up to and including total deprivation, whether the taking is by physical occupation for the public to use as a park, or by regulatory imposition to preserve the property as a

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[22] In addition to the analytical discontinuities that are created by such an all-or-nothing rule, there are practical difficulties as well. *See* Epstein, *supra* n. 14.

[23] See, e.g., A.V. Kendall & S.J. Plager, *Severance Damage in Eminent Domain Proceedings*, 10 U.Fla.L.Rev. 1 (1957).

wetland so that it may be used by the public for ground water recharge and other ecological purposes.[24]

The felt need for some kind of a special rule in regulatory takings cases may stem from the difficult line that has to be drawn between a partial regulatory taking and the mere 'diminution in value' that often accompanies otherwise valid regulatory impositions. As expressed by Justice Holmes in *Pennsylvania Coal*, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone." *Id.*, 260 U.S.

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[24] Dissenting in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 652, 101 S.Ct. 1287, 1304, 67 L.Ed.2d 551 (1980), Justice Brennan wrote:

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it. From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property.

at 413, 43 S.Ct. at 159. Gone as well, it is almost superfluous to add, would be the constraints imposed on the Government by the takings clause.

One way to avoid this linedrawing problem would be to declare that no regulatory taking is compensable under the Fifth Amendment; the only available remedy for a regulation that goes 'too far' is invalidation of the imposition. That was the historic practice in the courts for much of the twentieth century, but the Supreme Court definitively rejected that practice in *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). The Fifth Amendment "is designed 'not to limit the governmental interference with property rights *per se,* but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.' " *Preseault v. ICC,* 494 U.S. 1, 11, 110 S.Ct. 914, 921, 108 L.Ed.2d 1 (1990) (quoting *First English,* 482 U.S. at 315, 107 S.Ct. at 2385; emphasis in both cases).[25]

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[25] We note in passing that in both *First English* and *Preseault* the Supreme Court applied the takings clause to property interests less compendious than a fee simple. *First English* concerned a temporary prohibition on the use of land in a floodplain. The Supreme Court did not hold, as the dissent would have us today, that the Government's temporary taking required that the Government purchase the fee. Instead, the Supreme Court held that the Fifth Amendment required compensation for what was taken, *viz.* the use of the petitioner's land for a limited period of time. *Preseault* involved a reverter on an easement. The Supreme Court held that the takings challenge was premature because the petitioner had not brought a claim under the Tucker Act in the Court of Federal Claims. The Supreme Court was not concerned that the interest with which the Government had allegedly interfered was a contingent future interest.

Nothing in the Fifth Amendment limits its protection to only 'categorical' regulatory takings, nor has the Supreme Court or this court so held.[26] Thus there remains in cases such as this the difficult task of resolving when a partial loss of economic use of the property has crossed the line from a noncompensable 'mere diminution' to a compensable 'partial taking.'

The trial court will find itself with little direct case law guidance. As *Pennsylvania Coal* and subsequent appellate court decisions have recognized, the question of when a regulatory taking occurs cannot be answered as a matter of absolute doctrine, but instead requires case by case adjudication: "the question depends upon the particular facts." *Id.*, 260 U.S. 393 at 413, 43 S.Ct. at 158 at 159. *See also, inter alia, United States v. Caltex,* 344 U.S. 149, 156, 73 S.Ct. 200, 203, 97 L.Ed. 157 (1952); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168, 78 S.Ct. 1097, 1104, 2 L.Ed.2d 1228 (1958); *Penn Central* 438 U.S. 104 at 124, 98 S.Ct. 2646 at 2659, noting the "essentially ad hoc, factual inquiries" in takings jurisprudence. But recourse to the facts hardly solves the basic problem at hand – there simply is no bright line dividing compensable from noncompensable exercises of the Government's power when a regulatory imposition causes a partial loss to the

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[26] In *Yancey v. United States,* 915 F.2d 1534 (Fed.Cir.1990), a federal government quarantine to control avian influenza had caused the owner of a flock of healthy breeder turkeys to market them for slaughter. The resulting loss to the owner was approximately 75% of the breeder flock's value. This court found a compensable taking.

property owner. What is necessary is a classic exercise of judicial balancing of competing values.[27]

When there is reciprocity of advantage, paradigmatically in a zoning case, *see, e.g., Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), then the claim that the Government has taken private property has little force: the claimant has in a sense been compensated by the public program "adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659. Thus shared economic impacts resulting from certain types of land use controls have been held to be non-compensable. *Agins v. Tiburon*, 447 U.S. 255, 262-63, 100 S.Ct. 2138, 2143, 65 L.Ed.2d 106 (1980) (shared 'benefits and burdens' of a zoning ordinance); *Penn Central*, 438 U.S. 104 at 131, 98 S.Ct. 2646 at 2662 (same).

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[27] *See Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980) ("The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."); *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 318-319, 107 S.Ct. 2378, 2388, 96 L.Ed.2d 250 (1987) ("It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' ") (citing *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960)); *Penn Central*, 438 U.S. 104 at 125, 98 S.Ct. 2646 at 2659 ("the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations" in takings analysis).

That the purpose and function of the regulatory imposition is relevant to drawing the line between mere diminution and partial taking should not be read to suggest that when Government acts in pursuit of an important public purpose, its actions are excused from liability. To so hold would eviscerate the plain language of the Takings Clause, and would be inconsistent with Supreme Court guidance.[28] It is necessary that the government act in a good cause, but it is not sufficient. The takings clause already assumes the Government is acting in the public interest: "nor shall private property be taken *for public use* without just compensation" (emphasis added).

It is for the trial court as an initial matter to determine whether the Government acted within its proper role in the circumstances presented by the case of *Florida Rock*. Marketplace decisions should be made under the working assumption that the Government will neither prejudice private citizens, unfairly shifting the burden of a public good onto a few people, nor act arbitrarily or capriciously, that is, will not act to disappoint reasonable investment-backed expectations. The Government, in a word, must act fairly and reasonably, so that private parties can pursue their interests. At the same time, when Government acts as the intermediary between private interests to provide a mutually beneficial environment from which all benefit and in which all can thrive, the

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[28] In *Lucas*, the South Carolina Supreme Court had held that the State's purpose in protecting oceanfront ecology excused the State from liability for its regulatory imposition. The Supreme Court held that was not the correct criterion for takings jurisprudence. *Lucas*, 505 U.S. ___, 112 S.Ct. 2886.

shared diminution of free choice that results may not rise to the level of constitutionally required compensation.

In addition, then, to a demonstration of loss of economic use to the property owner as a result of the regulatory imposition – a fact yet to be properly determined in this case – the trial court must consider: are there direct compensating benefits accruing to the property, and others similarly situated, flowing from the regulatory environment? Or are benefits, if any, general and widely shared through the community and the society, while the costs are focused on a few? Are alternative permitted activities economically realistic in light of the setting and circumstances, and are they realistically available? In short, has the Government acted in a responsible way, limiting the constraints on property ownership to those necessary to achieve the public purpose, and not allocating to some number of individuals, less than all, a burden that should be borne by all?

Admittedly this is not a bright line, simply drawn. Property owners and regulators, attempting to predict whether a governmental regulation has gone too far, will still need to use judgment and exercise care in making decisions. In this sense our decision today continues the tradition of *ad hoc* judicial decisiónmaking in this area. Over time, however, enough cases will be decided with sufficient care and clarity that the line will more clearly emerge.

The dissent rejects drawing the line between non-compensable 'mere diminution' land use regulatory restraints and compensable takings of property interests

that involve less than all of the fee estate. The dissent favors an all or nothing approach – if some critical threshold of value loss is reached as a result of the regulatory imposition, then the property owner is entitled to compensation for the taking of the entire fee. This is, of course, another way to handle the problem of partial takings, but there are serious problems with the dissent's approach.

If the dissent's approach provided a bright line and avoided the *ad hocery* problem, that might argue in its favor. But it does not. Determining the threshold in any given case which, under the dissent's view would trigger full compensation, requires the same sort of weighing and balancing of indeterminate factors. Furthermore, the dissent endorses the questionable policy of forcing the Government to pay for something it does not want and has not taken. The dissent's approach requires the Government to pay for the 'fee' in the land – i.e., the entire bundle of rights – even though the Government may be seeking only to restrict certain kinds of development or certain uses. This has the potential of unfairness to both the Government and the property owner. The latter may wish to be paid for what she has lost but keep the rest; and the Government should not be put to the obligation of paying for more than it wants when it does not set out to take it.[29] The property owner is entitled to just compensation for what is taken, no less, but no more.[30]

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[29] This of course does not free the Government from paying for a 'categorical' taking even though it may have thought it was only restricting certain uses, if in fact the consequence of the regulatory imposition is to take essentially all economic value. *See, e.g., Lucas.*

[30] "Of course, payment need only be made for what is taken, but for all that the Government takes it must pay." *United*

The dissent is concerned that what is being taken is 'value,' not property.[31] In fact, in a regulatory context such as this it is both. By taking some portion of Florida Rock's economic use of the property – its power to disturb the overlying wetlands, and with it the common law property right to mine its subsurface minerals – the Government appears to have destroyed part of the value of Florida Rock's holdings. If that proves to be the case, and if the application of the *ad hoc* tests previously described so warrant, the property interest taken belongs to the Government, and the right to just compensation for the interest taken belongs to Florida Rock.[32]

States v. Dickinson, 331 U.S. 745, 750, 67 S.Ct. 1382, 1385, 91 L.Ed. 1789 (1946).

[31] In *Yancey v. United States*, *see supra* n. 26, just compensation was required to be paid for a loss in value sustained by the property owner. The Government did not take title to any of the 3,295 turkeys.

[32] Identification of a specific property interest to be transferred to the Government should pose little problem for property lawyers. Property interests are about as diverse as the human mind can conceive. Property interests may be real and personal, tangible and intangible, possessory and non-possessory. They can be defined in terms of sequential rights to possession (present interests – life estates and various types of fees – and future interests), and in terms of shared interests (such as the various kinds of co-ownership). There are specially structured property interests (such as those of a mortgagee, lessee, bailee, adverse possessor), and there are interests in special kinds of things (such as water, and commercial contracts). And property interests play across the entire range of legal ideas: *see, e.g., Tompkins v. Superior Court of San Francisco*, 59 Cal.2d 65, 27 Cal.Rptr. 889, 378 P.2d 113 (1963) (did joint occupancy of an apartment give one occupant the kind of possessory property interest that carried with it the power to grant

The Supreme Court did not have any difficulty in finding that a property interest was taken when the Government authorized the installation of a small cable box on an apartment building; the Government was not required to buy the building. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). Nor was there any difficulty in finding a property interest taken – if it needs a label, call it a limited co-tenancy with an easement for access – when the Government sank wells on an owner's property and periodically entered to service the wells and to make tests of the water. *Hendler v. United States*, 952 F.2d 1364 (Fed.Cir.1991). The fact that the source of any particular taking is a regulation rather than a physical entry should make no difference – the nature of legal interests defining the property affected remains unchanged.

Finally, the dissent believes that Supreme Court precedent establishes that a Fifth Amendment claim that specific property has been taken is an all or nothing proposition. If taken to mean that a regulatory taking cannot result in less than a taking of the property owner's entire fee estate, we cannot agree. There has never been any question but that the Government can take any kind of recognized estate or interest in property it chooses in an eminent domain proceeding; it is not limited to fee interests. We see no reason or support for a different rule in inverse condemnation cases, and that is true whether the taking results from a physical or regulatory action.

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to police legal entry to search without a warrant for the other occupant's marijuana stash).

In this case we have concluded that the record does not support a finding that the fee in the land, i.e., all economic use or value, was taken by this regulation, although that question is still an open one to be decided by the facts of valuation properly found. Since loss of economic use and value is the issue in this regulatory taking case, it is not possible, absent a valid determination in the record of the 'after imposition' value of the land, to know if a taking occurred, much less what the Government must pay for it. We are compelled, therefore, to remand the matter to the trial court for a determination of that essential piece of information, and for an initial determination as to its significance in order to decide whether there is a compensable taking of property.

CONCLUSION

The judgment of the Court of Federal Claims is vacated and the matter is remanded for further proceedings consistent with this opinion.

VACATED AND REMANDED.

NIES, Chief Judge, dissenting.

On procedural and substantive grounds, I respectfully dissent from the majority's remand for a determination of whether the United States must pay compensation under the Fifth Amendment to the extent that the 98 acres in issue lost a substantial part, but not essentially all, of its economic use or value. The majority's theory is contrary to Fifth Amendment "takings" jurisprudence as

delineated by the Supreme Court and this court. Labelling its lost use/value theory a "partial taking" (ipse dixit) does not give it any legitimacy.

Inverse condemnation of land, like the affirmative exercise of the power of eminent domain, requires the transfer of the property found to be taken to the United States. Value is not a transferable interest. Thus, a claim for loss of value does not constitute a takings claim within the meaning of the Fifth Amendment.

In response to the dissent, the majority opines that any loss in value due to a regulatory restriction on land use can be easily transmuted into a taking of a property right in the land (Op. p. 1570, n. 26) and that such right will belong to the government (Op. p. 1570). The majority's recognition that a successful claim of inverse condemnation of land transfers property rights is salutary. However, the majority's throw-in line on the transfer of a property right to the United States does not change the thrust of its opinion that damages must be paid to the extent of loss of value in the fee to the 98 acres.

The majority's partial taking theory, now vaguely tied to property rights, appears to borrow from the views of then Justice Rehnquist in his dissent in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138-153, 98 S.Ct. 2646, 2666-2674, 57 L.Ed.2d 631 (1978), and restated in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 506-521, 107 S.Ct. 1232, 1252-1261, 94 L.Ed.2d 472 (1986) that the taking of an identifiable property right should be compensable. However, the Supreme Court, in *Penn Central* (and in *Keystone*) rejected the division of the

fee owner's bundle of property rights into separate takable rights. *Penn Central*, 438 U.S. at 130-31, 98 S.Ct. at 2662; *Keystone*, 480 U.S. at 470-501, 107 S.Ct. at 1232-1250. These decisions and all others require one to focus on the effect of a regulatory restriction on the totality of an owner's rights in the property. See also *Concrete Pipe & Prod. v. Const. Laborers Pen. Tr.*, ___ U.S. ___, ___, 113 S.Ct. 2264, 2291, 124 L.Ed.2d 539 (1993) (citing *Keystone*). A diminution in value from denial of an economic use (even if the loss can be expressed in property right terms) is insufficient to effect a taking under *all* Supreme Court precedent so long as substantial other uses are left to the owner. While the Supreme Court may rethink and change its rulings, this court is not free to adopt positions in conflict with decisions of the Court, anticipating that the Court will be persuaded to adopt a dissenting Justice's view. In any event, the majority espouses compensation for a partial taking of the fee, which is not the same as the total taking of a severable interest. No support for the partial taking theory can be found even in dissents.

With respect to procedural error after the first remand, the issue in this case was limited to whether the entire fee had been taken, which turned on whether the property had a substantial value after the denial of the permit. As this court specifically instructed in *Florida Rock II*,

> [I]f there is found to exist a solid and adequate fair market value (for the 98 acres) which Florida Rock could have obtained from others for that property, that would be a sufficient remaining use of the property to forestall a determination that a taking had occurred or that any just

> compensation had to be paid by the government.

791 F.2d 893, 903 (Fed.Cir.1986). This court in *Florida Rock II* remanded for a determination of whether substantial value remained. If it did, no taking occurred. The majority sides with the government on that issue and holds that the entire fee was not taken, which should have ended this litigation under principles of law of the case. Instead, the majority remands to allow Florida Rock to prove a different claim, indeed, a claim once raised and now subsumed in the judgment.[1] Therefore, the issue of a "partial taking," had it been argued on appeal by Florida Rock, would be outside the scope of appellate review because that party filed no cross appeal,[2] and it is not an argument in support of the judgment. *United States v. American Ry. Exp. Co.*, 265 U.S. 425, 435, 44 S.Ct. 560, 563, 68 L.Ed. 1087 (1923).

This court has no license to shape a case more to its liking by not only ignoring the law of the case but also effectively taking an appeal for Florida Rock. The trial

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[1] Florida Rock's complaint in the Court of Federal Claims originally sought, *inter alia*, damages for the diminution in value of its land but, during the course of litigation, that issue dropped out in the first trial, and no appeal of the viability of that type of claim was taken. Rather, the issue litigated was whether the United States had taken the entirety of the fee to the 98 acres. The majority brings a closed issue back into the entirety of the case by its partial taking theory.

[2] An appellee must file a cross appeal when issues it seeks to raise constitute an attack on the judgment below but not when the issues are merely alternative arguments in support on the judgment. Moore, *Moore's Federal Practice* ¶ 254.11[3] at 4-46 (1993).

court ordered the government to pay $1 + million for the 98 acres and ordered Florida Rock to tender a deed to the property. Florida Rock tied its fate to upholding that judgment. Under the majority's ruling that the entirety of the fee was not taken, Florida Rock loses.

While the procedural issue is dispositive, I will also address the merits of the majority theory of a "partial" taking which conflicts with current Supreme Court precedent and the precedent of this court.

I

No legal subject has received the attention of scholars more than "takings" jurisprudence in recent years. A flood of literature has been produced advocating various theories of property and social responsibilities.[3] Some

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[3] Jed Rubenfeld, "Usings," 102 Yale L.J. 1077 (1993); Glenn Sugameli, "Takings Issues in Light of *Lucas v. South Carolina Coastal Council;* A Decision Full of Sound and Fury Signifying Nothing." 12 Virginia Env.L.J. 439 (1993); Erika Jones et al., "The Fifth Amendments Just Compensation Clause: Implications to Regulatory Policy," 6 Adm.L.J. of American U. 674 (1993); Hon. John M. Walker, "Common Law Rules and Land Use Regulations: *Lucas* and Future Takings Jurisprudence," 3 Const.L.J. 3 (1993); Richard Epstein, *"Lucas v. South Carolina Coastal Council:* A Tangled Web of Expectations," 45 Stan.L.Rev. 1369 (1992); William W. Fisher III, "The Trouble with *Lucas,"* 45 Stan.L.Rev. 1393 (1992); Joseph L. Sax, "Property Rights and the Economy of Nature: Understanding *Lucas v. South Carolina Coastal Council,"* 45 Stan.L.Rev. 1433 (1992); Richard J. Lazarus, "Putting the Correct Spin in *Lucas,"* 45 Stan.L.Rev. 1411 (1992); Andrea L. Peterson, "The Takings Clause: In Search of Underlying Principles Part I – A Critique of Current Takings Clause Doctrine," 77 Cal.L.Rev. 1299 (1989); Douglas W. Kmiec,

espouse the view that property is held subject to complete control as to its use by the state and federal governments.[4] Others, at the opposite extreme, start from a premise that owners have a right to use their property in any manner, virtually without restriction, and, damages must be paid for any governmental interference with their use.[5] The more often the government must pay for exercising control over private property, the less control there will be. That is the reality.

The majority decision discusses "takings" law in a conventional manner through sections A and B of its analysis. But then it leads us into the camp of those who

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"The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse," 88 Colum.L.Rev. 1630 (1988); William A. Fischel, "Introductions: Utilitarian Balancing and Formalism in Takings," 88 Colum.L.Rev. 1581 (1988); Frank Michelman, "Takings, 1987", 88 Colum.L.Rev. 1600 (1988); Margaret Jane Radin, "The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings," 88 Colum.L.Rev. 1667 (1988); Susan Rose Ackerman, "Against Ad Hocery: A Comment on Michelman," 88 Colum.L.Rev. 1697 (1988); Richard A. Epstein, *"Takings: Private Property and the Power of Eminent Domain"* (1985); Margaret Jane Radin, "Property and Personhood," 34 Stan.L.Rev. 957 (1982); Frank Michelman, "Property, Utility, and Fairness: Comment on the Ethical Foundations of Just Compensation Law," 80 Harv.L.Rev. 1165 (1967).

[4] Sax, *supra*, "Property Rights and the Economy of Nature: Understanding *Lucas v. South Carolina Coastal Council*," 45 Stan.L.Rev. 1433 (1992). Although not so stated, such theorists would, in effect, superimpose the constitutional powers of Congress on land rights much as the constitutional powers may negate state immunity under the Eleventh Amendment.

[5] Epstein, *Takings: Private Property and the Power of Eminent Domain*, (1985).

advocate damage awards for regulatory restriction (Op. p. 1568). Its economic justification that the government will now pay less for regulatory interference with private property is specious. In the absence of governmental restrictions rising to the very high level of a total "taking" of the property in issue required by Supreme Court precedent, *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225-228, 106 S.Ct. 1018, 1026-1027, 89 L.Ed.2d 166 (1985); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130-31, 136-38, 98 S.Ct. 2646, 2662, 2665-2666, 57 L.Ed.2d 631 (1978), the government does not now pay. It may pay more in the few cases where a claimant can satisfy those high standards, but it requires little imagination to envision the vast sums required for lost value/use claims if the government must pay for mere impairment of rights. Indeed, the objective of the theory is to preclude government regulation[6] precisely because regulation will entail too great a cost. Only in this respect will the theory save the public fisc.

The majority does not analyze loss of value and transfer of a property right separately under its partial taking theory. Essentially it sees no distinction in a property right, an economic use and a loss of value. However, I will address lost value separately from property rights because the concepts, which may be the same under "law-and-economics" theories, are not interchangeable in established takings jurisprudence.

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[6] *Id.*

A.

Loss of Value

The majority view that lost value of land in itself is compensable is not the course set by the Supreme Court. *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1945), provides perhaps the clearest statement that an inverse condemnation claim respecting land rights requires an identification of the specific property interest to be transferred to the government. *Causby* involved a takings claim by reason of low military aircraft flights over the plaintiffs chicken farm which destroyed its use for that purpose. As held therein:

> [T]he Court of Claims held, as we have noted, that an easement was taken. But the findings of fact contain no precise description as to its nature. It is not described in terms of frequency of flight, permissible altitude, or type of airplane. Nor is there a finding as to whether the easement taken was temporary or permanent. *Yet an accurate description of the property taken is essential, since that interest vests in the United States. United States v. Cress, supra* [243 U.S. 316], 328-329 [37 S.Ct. 380, 385, 61 L.Ed. 746 (1917)], and cases cited.

Id. at 267, 66 S.Ct. at 1069 (emphasis added).

"Value" is not a property right under Florida law or any state law that I can uncover. While much of takings law is unclear, one principle is not. Rights in land depend on the law of the particular state. *Preseault v. ICC*, 494 U.S. 1, 16 n. 9, 20-25, 110 S.Ct. 914, 924 n. 9, 108 L.Ed.2d 1 (1990) (majority and concurring opinions); *Ruckelshaus v.*

Monsanto Co., 467 U.S. 986, 1001, 104 S.Ct. 2862, 2871, 81 L.Ed.2d 815 (1984) ("Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."). Use of generalities respecting "property" law disserves the development of coherent takings jurisprudence. The right taken must be identified not only because, when transferred, it becomes the property of the United States. *Id.*; *Deltona Corp. v. United States*, 228 Ct. Cl. 476, 657 F.2d 1184, 1190 (1981), but also because compensation is fixed at the fair market value of the transferred property right. *Yuba Natural Resources, Inc. v. United States*, 904 F.2d 1577, 1580 (Fed.Cir. 1990).[7] This bedrock requirement means that, the United States having purchased the fee or a property right, no second claim that the government took that specific property is possible.

In contrast, a lost value damage claim would impose not even an easement on the land. Successive claims are not only possible but likely. If loss of value alone created a claim, Florida Rock not only would receive the damage award, but also would keep its land. In effect, takings jurisprudence would become a novel type of Fifth Amendment tort claim for regulatory injury to the landowner under which the United States must pay damages while receiving no quid pro quo. This is not the law.

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[7] In a temporary taking, the proper measure of compensation is the value of the use of the property interest during the taking, since the government returns the property interest to the owner when the taking ends. *Yuba*, 904 F.2d at 1580-81.

Inverse condemnation jurisprudence, like the direct exercise of eminent domain power, is based to a large extent on *in rem* concepts.[8] Thus, the theory of compensation simply for a loss in the land's value, not for the taking of a property right founded on Florida law, is untenable.

The Supreme Court has long *rejected* the position that a diminution in economic value of private lands caused by government regulation of its use requires compensation. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 131 98 S.Ct. 2646, 2662, 57 L.Ed.2d 631 (1978); *Welch v. Swasey*, 214 U.S. 91, 29 S.Ct. 567, 53 L.Ed. 923 (1909). As stated in *Penn Central*, "[Supreme Court precedent] uniformly reject[s] the proposition that diminution in property value, standing alone, can establish a taking." *Penn Central Transp. Co.*, 438 U.S. at 131, 98 S.Ct. at 2663 (citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) (75 percent diminution in value caused by zoning law); *Hadachek v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (87½ percent diminution in value)). The taking issue "is resolved by focusing on the uses the regulations permit." *Penn Central*, 438 U.S. at 131, 98 S.Ct. at 2663.

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[8] "While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceeding." *First English Lutheran Church v. Los Angeles County*, 482 U.S. 304, 316, 107 S.Ct. 2378, 2386, 96 L.Ed.2d 250 (1986).

Appellants in *Penn Central* argued that the NYC landmark law effected a taking because its operation had significantly diminished the value of the Penn Central Terminal site. Appellants further argued that any restriction imposed on individual landmarks pursuant to the Landmark Law constituted a taking requiring just compensation. The Court found "no merit" in the argument. *Id.*

Thus, it is clear that no claim under the Fifth Amendment for a taking is stated by allegations that the property in issue simply lost value.

B.

The Property Rights in Issue

In the instant case, while there is no allegation that the government took a property right from the fee owned by Florida Rock, the majority suggests throughout its opinion that mining rights are the property rights in issue whose loss require prorata compensation. Florida Rock's position in contrast is that the denial of the permit for mining effectively took the entire fee by reason of the denial of all economically viable use. This latter position tracks precedent that government actions, which leave some property rights in the owner may, nevertheless, so severely interfere with private land use that they are deemed equivalent to outright condemnation of the land for public use. *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 177-180, 20 L.Ed. 557 (1871) ("taking" by flooding land by dam construction).

Lucas v. South Carolina, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), is the latest in a series of "takings" cases issued since this case was previously on appeal. The plaintiff pleaded the taking of the "fee simple interest" to certain lands. *Id.* at ___ n. 7, 112 S.Ct. at 2894 n. 7. *Lucas* is instructive that a taking of the fee may be found even though the owner was left with some property rights after the governmental action. The state regulations at issue in *Lucas* prohibited any building on Lucas' two oceanfront privately-owned lots. The regulations did not strip the owner of all property rights, e.g., the right to sell or devise the land. Nevertheless, the court held that the denial of all economically viable use by state regulation effected a categorical and total taking of the land unless, under state law, the action amounted to abatement of a "nuisance."[9]

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[9] This exception appears inapt as applied to federal regulation. The source of federal action is constitutional, as is the requirement for compensation. Precedent respecting takings by state action must be carefully parsed to determine whether the principles are equally applicable to federal regulation. The authority of Congress to impose use restrictions in this case rests on the commerce clause which, it is true, may be exercised to achieve purposes akin to a state's police power. *Brooks v. United States*, 267 U.S. 432, 436-37, 45 S.Ct. 345, 346, 69 L.Ed. 699 (1925). But it is not at all clear or logical that a state's nuisance law, which the *Lucas* court recognized as the basis for no compensation respecting a state's exercise of police powers, is also the limit of the federal power to take property without compensation. The noncompensable seizure of houses, cars, boats, airplanes, or other private property in connection with drug crimes seems to belie the majority's assumption (Op. p. 1577 n. 10) that state nuisance law alone defines the interrelation of commerce and the Fifth Amendment.

The *Lucas* opinion begins with the recognition that a claim that a governmental regulation took private property for public use has generally required *ad hoc* factual inquiries into the circumstances of each case, there being no set formula for deciding that the action effected an inverse condemnation. *Id.* at ___, 112 S.Ct. at 2893. In *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25, 106 S.Ct. 1018, 1026, 89 L.Ed.2d 166 (1986) (citing *Penn Central Transportation Co.*, 438 U.S. at 124, 98 S.Ct. at 2659), the Court had provided the following guidance:

> To aid in this determination, however, we have identified three factors which have "particular significance": (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action."

In *Lucas*, two discrete categories of regulatory action were delineated as compensable without case-specific inquiry namely, (1) regulation allowing physical "invasion" of private property and (2) regulation denying *all* economically beneficial or productive use of land. ___ U.S. at ___, 112 S.Ct. at 2893. Thus, where *less* than *all* economically beneficial or productive use of land is lost by reason of governmental regulation, one reverts to an *ad hoc* inquiry to determine whether the property in issue, here the fee, was taken.

In contrast, the majority divides the "ad hoc" inquiry into two types of takings, total and partial. After finding there is no categorical taking by physical invasion or prevention of *all* economic use of land, the two situations recognized in *Lucas*, the majority concludes that, under

the *ad hoc* inquiry, the claimant may recover proportional compensation for the impairment of economic use if it passes a threshold beyond "diminution in value."[10] Contrary to the majority, in an *ad hoc* inquiry, the reduction in value resulting from use restriction pertains to whether a "taking" occurred. In making the "taking" determination, such loss is a factor. *Id.*, at ___ n. 8, 112 S.Ct. at 2895 n. 8 (95 percent loss may not get "benefit of categorical formulation" but "keenly relevant to takings analysis"). The loss in value, however, is not the property taken (as discussed *supra*) nor the measure of compensation. *Yuba*, 904 F.2d at 1580.

Under Supreme Court precedent, a Fifth Amendment claim that specific property has been taken is an all or nothing proposition. Either the property in issue has been taken and the fair market value at the time of the taking must be paid, or the property is not taken and no compensation is due. *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 800-803 (Fed.Cir.1993). The answer is "yes" or "no,"

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[10] The majority supports its theory with citation to *Loretto* and *Hendler*. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982); *Hendler v. United States*, 952 F.2d 1364 (Fed.Cir.1991). Both are physical occupation cases decided under a categorical analysis, whereas the majority's taking theory is analyzed under an *ad hoc* analysis. In a permanent physical occupation case, the size of the property interest taken is irrelevant. *Loretto*, 458 U.S. at 434-35, 102 S.Ct. at 3175. Had *Loretto* been analyzed under an *ad hoc* inquiry, the result may well have been different. *See id.* at 452-53, 102 S.Ct. at 3185 (Blackmun, J. dissenting) ("[A]ny intelligible takings inquiry must also ask whether the extent of the state's interference is so severe as to constitute a compensable taking in light of the owner's alternative uses for the property.").

not "partially." See *Lucas*, ___ U.S. at ___, n. 8, 112 S.Ct. at 2895 n. 8 ("Takings law is full of those 'all-or-nothing' situations."). Thus, under an *ad hoc* analysis, a 95 percent loss of value in the land, for example, may be sufficient, when considered with other factors, to require the government to purchase 100 percent of the interest in the land, i.e. the fee. Conversely, the landowner asserting the taking of the fee receives nothing, despite the loss in value caused by the regulatory action, if the factors weighed together do not mandate that the government must become an "involuntary purchaser" of the fee. *Florida Rock II*, 791 F.2d at 905.

The majority states that in *Lucas*, the Supreme Court touched upon but did not have to decide "the partial taking question." (Op. p. 1568-69). The Supreme Court did note that precedent did not make it clear, even in a categorical taking, how to determine "the property interest against which the loss of value is to be measured." The court noted that "this uncertainty regarding the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court [citations omitted]." *Lucas*, ___ U.S. at ___ n. 7, 112 S.Ct. at 2894 n. 7. The majority seeks to shoehorn its "partial taking" theory into this open question. It does not fit. The *Lucas* court left open the question of how to determine the property interest in issue, the denominator. One would still determine whether there is a total taking of that property interest. The "partial taking" theory does not change the denominator or even the numerator. The majority's denominator remains the fee and if an *ad hoc* inquiry negates that the fee is taken, one simply would go on,

(under the majority's view) to consider proportional compensation if a threshold of injury, more than "mere diminution", is passed.[11]

There can be no question that the "partial" taking theory of the majority does not change the property in issue (the denominator) from the fee to mining rights. If the taking of mining rights were the issue, one would simply evaluate the mining rights at the time the permit was denied. And there would be no need to remand to determine if a taking of such rights occurred. One would merely remand for their evaluation. Cf. *Penn Central*, 438 U.S. at 152, 98 S.Ct. at 2673 (Rehnquist, J. dissenting). Mining is clearly precluded and such right has zero value to Florida Rock after the action on the permit. The majority, instead, engages in a complicated before and after taking evaluation of the fee. But the loss in value *of the fee* does not reflect the value of mining rights on the date of permit denial. One must also take into account that the land is zoned for five-acre residential development as well. It is pure speculation whether the substantial residual value found by the majority reflects investment value for future mining use or for future residential use.[12] What the majority's evaluation analysis makes clear is that its

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[11] Anomalously the majority remands for advice on the legal standard of what percentage must be taken to rise to the level of a partial taking.

[12] Once mining rights are transferred to the government, the majority's theory of post-takings value based on offers to buy the land because of possible change in regulations is thrown entirely askew. There could be no change in regulations which would give a subsequent owner the right to mine the mineral estate which the majority agrees becomes government property.

discussion of mining rights merely serves to obfuscate its theory that a substantially less than total loss of value in the fee must be compensated.

The majority's partial taking theory finds no home in an *ad hoc* analysis. As reaffirmed most recently in *Concrete Pipe & Proc.*, ___ U.S. at ___, 113 S.Ct. at 2290:

> [A] claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question. Accord, *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497, 107 S.Ct. 1232, 1248, 94 L.Ed.2d 472 (1987) ("[O]ur test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, [and] one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction' ") (citation omitted).

The *ad hoc* analysis answers the question whether the entirety of the property in issue should be deemed confiscated even where the owner retains some rights. It gives no guidance on how to determine what is the property in issue, i.e., the denominator. It is simply the formula to apply after the denominator is properly defined. That "complex question" is not facilely answered by giving the restricted interest a name.

The law has been and continues to mandate that a court may not look only to the part of the entirety of property rights of a fee owner which a regulation restricts, whether called a property right, an economic use, or simply value. As *Concrete Pipe* informs us, there is always a total taking of that interest and conversely, a partial taking of the fee. This is, indeed, the precise rationale for requiring an *ad hoc* analysis. One must weigh the rights (and value) of the property in issue before regulatory action against the rights (and value) therein after regulatory restriction and find confiscatory disparity between the two values for a taking to be found. Thus, where only a portion of the acreage of a tract is affected by denial of a wetlands permit, we have held under an *ad hoc* analysis that no taking of the tract occurred and no compensation was due. *Deltona Corp. v. United States*, 228 Ct.Cl. 476, 657 F.2d 1184, 1192 (1981).[13]

The difficult issue of what is the property in issue (the denominator) was avoidable in *Lucas* because the plaintiff claimed the fee was taken. Here as well. Respecting the denominator, as indicated, we do not have a question of the taking of a *severable* interest, i.e., mining rights from the bundle of rights in the land.[14] Indeed,

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[13] Indeed, in this case, it is far from clear in my mind that the 98 acres should be treated as a severed tract rather than part of the 1500 + total acreage.

[14] It may also be noted that there is no issue involving frustration of Florida Rock's mining business. This court in *Florida Rock II* concluded that the trial court's finding of a taking based on the fact that Florida Rock was prevented from conducting a profitable mining business made the case "improperly one to recover for frustration of business purposes." *Id.*

Florida Rock abandoned any issue other than the taking of the fee in its entirety prior to the first appeal. *Florida Rock III*, 21 Cl.Ct. 161, 169 n. 5 (1990). At this stage of proceedings, nothing less is at stake than the entire fee interest in the 98 acres. The majority's ruling that the fee was not taken under an *ad hoc* analysis mandates reversal.

II

Inasmuch as the majority remands for determination of the difference in value of the fee, before and after permit denial, it is appropriate to point out the legal error in the $10,500 valuation figure as the value of the fee *prior* to denial of the permit. One must focus on the fair market value on the date of the denial, namely on October 2, 1982, because that is the date of the alleged taking. *First Lutheran*, 482 U.S. at 321 n. 10, 107 S.Ct. at 2389 n. 10 (the valuation of property taken must be calculated at time of taking); *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10, 104 S.Ct. 2187, 2194, 81 L.Ed.2d 1 (1983) (just compensation determined on the date property is taken); *Tabb Lakes v. United States*, 10 F.3d 796, 803 (Fed.Cir.1993) (compensation is measured from the time the taking occurs).

The pre-denial value ascribed to the fee by the trial court of $10,500 is the value of the wetlands acreage with *no* regulations. The trial court based the $10,500 figure on the acquisition cost with upward adjustments. *Florida Rock Indus., Inc. v. United States*, 21 Cl.Ct. 161, 169 n. 5 (1990) (*Florida Rock III*).

On the evidence of record, the $10,500 per acre figure does not reflect the fair market value of the fee immediately prior to the denial of the permit on Florida Rock's

property. The value of these lands prior to permit denial had previously been diminished by the state and federal *regulations* applicable to all wetlands. However, the regulations in themselves constitute no taking. As specifically held in *United States v. Riverside Bayview Homes, Inc.*:

> A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.

474 U.S. 121, 127, 106 S.Ct. 455, 459, 88 L.Ed.2d 419 (1985).

Thus, any loss attributable to the regulations is noncompensable. As evidenced by enactment of the FWPCA, the nation has come to recognize that wetlands are necessary resources which required special protection from unbridled development. Contrary to the majority, the limitations of development only under permit may be imposed on this type of property without compensation. *Id.*

Owners of such property have no right from ownership to use lands with this natural resource unfettered. Ownership of property carries responsibilities to the community as a whole as well as privileges. Like height limitations or five-acre zoning laws or other similar restrictions on use, the government's assertion of control

generally over use of wetlands, which devalues all such property to some extent, is not itself compensable. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed.2d 322 (1922). Thus, the fair market value of the fee must be determined with these general restrictions on land use in place, not as if no regulations of wetlands existed at all. Only with this adjustment is the *pre-taking* value of the property properly determined. Indeed, the evidence of sales of "comparable" lands in the 1980's, discussed by the majority in connection with *post-taking* valuation, appears in fact to reflect the *pre-taking* impact of general wetlands regulations on neighboring property values.

The majority treats sales of wetland property on which no permit was denied as evidence of the value of wetland property on which a permit was denied. Under the majority's rationale, the denial of the permit has *no effect* on valuation. Actually, the majority is suggesting a partial taking occurred based on a comparison between the original value of the subject land and the later lower value of other property, lower because depressed by general regulations, but for which no permit was denied. That would mean the existence of general regulations respecting wetlands effected the taking, which is contrary to the Supreme Court's decision in *Riverside Bayview, supra*. Moreover, the actual alleged act of taking under the majority's view can be simply ignored. Muddled though land takings law may be, it is not so muddled that these concepts can pass muster.

United States Court of Appeals
for the Federal Circuit

Official Caption[1]

91-5156

FLORIDA ROCK INDUSTRIES, INC.,

Plaintiff-Appellee.

v.

THE UNITED STATES,

Defendant-Appellant.

Authorized Abbreviated Caption[2]

FLORIDA ROCK IND V US, 91-5156

(Filed June 21, 1994)

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLEE, and a response thereto having been invited by the court and filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

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[1] Required for use on petitions, formal briefs and appendices, court opinions, and dispositive court orders. FRAP 12(a); 32(a).

[2] Authorized for use only on items not requiring the Official Caption as listed in note 1.

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on June 28, 1994.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

Dated: June 21, 1994

By /s/ Diane M. Frye
Diane M. Frye
Chief Deputy Clerk

cc: ROBERT L. KLARQUIST
JOHN A. DE VAULT, III

FLORIDA ROCK IND V US, 91-5156
(CLM - 266-82 L)

United States Court of Appeals
for the Federal Circuit

Official Caption[1]

91-5156

FLORIDA ROCK INDUSTRIES, INC.,

Plaintiff-Appellee.

v.

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Defendant-Appellant.

Authorized Abbreviated Caption[2]

FLORIDA ROCK IND V US, 91-5156

(Filed June 21, 1994)

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT and a BRIEF IN SUPPORT OF APPELLANT having also been filed by AMICI CURIAE NATIONAL WILDLIFE FED., et al, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc, the brief of amici curiae, and response having been

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referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on June 28, 1994.

Circuit Judge Nies would rehear the appeal in banc.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

Dated: June 21, 1994

By /s/ Diane M. Frye
Diane M. Frye
Chief Deputy Clerk

cc: ROBERT L. KLARQUIST
JOHN A. DE VAULT, III

FLORIDA ROCK IND V US, 91-5156
(CLM – 266-82-L)

FLORIDA ROCK INDUSTRIES, INC., Plaintiff,

v.

The UNITED STATES, Defendant.

No. 266-82L.

United States Claims Court.

July 23, 1990.

Landowner brought Tucker Act action, claiming that denial of Clean Water Act discharge permit for limestone mining amounted to taking. The Claims Court, 8 Cl.Ct. 160, entered judgment in favor of landowner, and Government appealed. The Court of Appeals, 791 F.2d 893, affirmed in part, vacated in part, and remanded. On remand, the Claims Court, Smith, Chief Judge, held that: (1) proposed use of property for limestone mining would not have constituted nuisance; (2) Government failed to establish that investment market for property following denial of permit was comprised of investors with knowledge of restrictions on land; and (3) denial of permit constituted taking for which landowner was entitled to damages in amount of full fair market value of property at time of taking.

Ordered accordingly.

John A. DeVault, III, with whom were C. Warren Tripp, Jr., Jane A. Lester, and John Tolson, Jacksonville, Fla., for plaintiff.

Fred R. Disheroon, with whom was David Kaplan, Washington, D.C., for defendant.

OPINION

SMITH, Chief Judge.

This regulatory taking claim is before the court on remand from the United States Court of Appeals for the Federal Circuit, which affirmed in part and vacated in part the opinion of the first trial court.[1] After considering evidence presented at the original trial and additional evidence presented after remand, the court finds that the Army Corps of Engineers' denial of a permit to fill plaintiff's property resulted in a taking, and accordingly awards just compensation as mandated by the fifth amendment.

FACTS

The facts underlying this case have been succinctly set forth by the appellate court, *Florida Rock Indus. v. United States*, 791 F.2d 893, 895-96 (Fed.Cir.1986), and are recited briefly below for the reader's convenience. The court relies on the findings of the district engineer of the Army Corps of Engineers (the Corps), as did the Federal Circuit.

Plaintiff, a large-scale miner of limestone, purchased a tract of 1,560 acres in Dade County, Florida in 1972, paying $2,964,000. The sole purpose for the acquisition was the mining of limestone; no other use or sale was ever considered. Because of a slump in the construction industry in South Florida, plaintiff did not attempt to

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[1] The first trial was held before then-Chief Judge Alex Kozinski.

mine the subject property until 1978, nor did it attempt to put the property to other use.

Shortly after the plaintiff's acquisition of the property but prior to the commencement of mining in 1978, Congress passed Public Law 95-217, 91 Stat. 1567 (Dec. 27, 1977), amending the Clean Water Act, 33 U.S.C. § 1251(a) (1988) and expanding the jurisdiction of the Corps to regulate activity affecting navigable waters. At the same time, § 404 of this law established a mechanism for applying for permits to discharge dredged or fill material into waters covered by the Clean Water Act. 33 U.S.C. § 1344 (1988).

Upon learning of plaintiff's mining activities, and in the belief that a § 404 permit was required, the Corps issued a cease and desist order, with which plaintiff complied. Plaintiff then applied to the Corps for a permit which would enable it to mine 98 acres. This would have fulfilled its needs for a three-year period. Although plaintiff would have preferred a permit to mine the entire 1,560 acre tract, the Corps had indicated it would consider applications covering no more than a three-year need.

On October 2, 1980, the Corps denied plaintiff's application covering the 98 acres, finding the permit would not be in the public interest. No appeal was taken under the Administrative Procedure Act, 5 U.S.C. §§ 701, ff (1988), and no further applications were submitted.[2]

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[2] Nonetheless, plaintiff claimed that the entire parcel of 1,560 acres was taken as a result of the permit denial, because logic would indicate that if the Corps would not allow the

PRIOR PROCEEDINGS

The history of the prior proceedings in this case has been laid out at length in Senior Judge Nichols' opinion for the Federal Circuit, 791 F.2d at 896-97, and is summarized briefly below.

Following the district engineer's denial of plaintiff's permit application, plaintiff filed suit in the Claims Court, seeking just compensation for a regulatory taking, under the fifth amendment. The liability and damages aspects were bifurcated, and separate trials were held before Chief Judge Kozinski. At the conclusion of the trial on liability, the Chief Judge delivered an oral opinion, which later was modified and memorialized in a written opinion. *Florida Rock Indus. v. United States*, 8 Cl.Ct. 160 (1985). An order on valuation was issued after a trial on damages.

Chief Judge Kozinski found that, contrary to the Corps' finding, the activities proposed by plaintiff would not have polluted the water; he also found that there was no economically viable use for the property other than as a site for mining limestone. Based on these findings, he held that the government's action had resulted in a taking requiring just compensation. In fixing the amount of compensation to which plaintiff was entitled, Chief Judge Kozinski was persuaded by plaintiff's argument that the proper measure of damages was the immediate use value

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mining of 98 acres, it would not permit the mining of the remaining 1,462 acres. Chief Judge Kozinski ruled that the only parcel before the Corps had been the 98-acre tract, and therefore the only land that could be the subject of this taking litigation was that tract. The Federal Circuit affirmed this holding.

that had been lost, and in a subsequent order determined that the 98 acres in dispute were worth $10,500 per acre, or $1,029,000 for the tract.[3]

The Federal Circuit affirmed Chief Judge Kozinski's finding that the most that could have been taken was the 98-acre parcel, but vacated much of the remainder of the opinion and remanded for further proceedings. In doing so, the Federal Circuit Court noted:

> The trial judge failed to apply the evidence in a manner correct in all respects to determine whether he had an actual instance of a taking before him. . . . We remand for determination of the taking question according to right principles, as it would be improper for us to constitute ourselves fact finders and weigh the evidence ourselves.

791 F.2d at 894.

In addition to these general principles, the Federal Circuit found several aspects of the trial court's opinion contrary to the law. In particular, the Federal Circuit held that the trial court's inquiry into whether the proposed activity actually would have polluted the waters was an improper exercise of jurisdiction over a matter appropriate for review only by a district court under the Administrative Procedure Act. *Id.* at 898.

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[3] Although the court ruled that the only land taken by the permit denial was the 98 acres, it valued the entire 1,560-acre parcel. In the valuation order, it was determined that as of the date of taking, 1,240 acres were worth $7,500 per acre and 320 acres were worth $4,000 per acre, for a total of $10,580,000.

The appellate court also disapproved of the trial court's method of valuing the property potentially taken by looking at an immediate use value, as opposed to a fair market value. Specifically, the court ruled that it was clear error for the trial judge to exclude from consideration defendant's evidence of a potential investment market for the property. The court stated:

> Indeed, if there is found to exist a solid and adequate fair market value (for the 98 acres) which Florida Rock could have obtained from others for that property, that would be a sufficient remaining use of the property to forestall a determination that a taking had occurred or that any just compensation had to be paid by the government.

Id. at 903.

Defendant for the most part is correct that the Federal Circuit vacated Chief Judge Kozinski's findings. However, there are at least two exceptions. The Federal Circuit expressly affirmed the trial court's determination that the 98-acre parcel is the only property in dispute. Additionally, the appellate court did not disturb his finding that the pre-"taking" value of the property was $10,500 per acre, and this court must accept that figure for determining both liability and damages.[4] *See, e.g., Fidelity & Deposit Co. v. USAFORM Hail Pool*, 523 F.2d 744, 759 (5th Cir.1975), *cert. denied*, 425 U.S. 950, 96 S.Ct. 1725,

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[4] Additionally, the court has considered the method adopted by Chief Judge Kozinski in determining this value and finds that it is not clearly erroneous. As such, under the standard set forth in RUSCC 52(a), this prior determination will stand.

48 L.Ed.2d 194 (1976) (a trial court, when conducting proceedings following a remand, cannot disregard its previous factual findings if those findings were not disturbed on appeal). The court disagrees with defendant that no further evidence may be introduced on remand. Had the Federal Circuit intended for this case to be decided on the existing record, it would have remanded with directions to dismiss. Without further evidence of fair market values, it would be impossible for this court to make a "determination of the taking question according to right principles." 791 F.2d at 894.

Thus, the court is faced with the following questions on remand: whether plaintiff had a legitimate entitlement to the proposed use of its property; if so, whether the Corps' denial of a § 404 permit denied the plaintiff the economically viable use of its land so as to constitute a taking under the fifth amendment; and, if so, the amount of compensation to which plaintiff is entitled. Central to the outcome of the latter two questions is a determination of the fair market value of plaintiff's property after the denial of its permit application.

Finally, it must be added that although the parties hold differing views on the court's role on remand, and there is room for valid disagreement in interpreting some appellate opinions in this area, the Federal Circuit could not have been clearer when it concluded:

> On remand, the court should consider, along with other relevant matters, the relationship of the owner's basis or investment, and the fair market value before the alleged taking, to the fair market value after the taking. In determining the severity of economic impact, the owner's

> opportunity to recoup its investment or better, subject to the regulation, cannot be ignored.

Id. at 905.

DISCUSSION

Plaintiff's Legitimate Entitlement to the Proposed Use of its Property

Defendant has maintained throughout the course of this litigation that even if plaintiff otherwise has successfully demonstrated that the denial of its permit application resulted in the loss of all economic value in its property, it is not a taking because plaintiff had no legitimate entitlement to use its property for the particular activity it sought to conduct. Defendant grounds its argument on the proposition that the government need not compensate "individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property to inflict injury upon the community." *Keystone Bituminous Coal Ass'n v. De Benedictis*, 480 U.S. 470, 489, 107 S.Ct. 1232, 1244, 94 L.Ed.2d 472 (1987) (relying on *Mugler v. Kansas*, 123 U.S. 623, 668-69, 8 S.Ct. 273, 300-01, 31 L.Ed. 205 (1887), in which the state prohibited a brewery from manufacturing beer, thereby rendering the brewery valueless). In other words, a property owner has no right to use its property as a nuisance.

In commenting on what has become known as the nuisance exception to the general rule that just compensation is required when the government regulates the value out of private property, the Court of Appeals for the Federal Circuit stated that "no one has a legally protected

right to use property in a manner that is injurious to the safety of the general public." *Allied-General Nuclear Servs. v. United States*, 839 F.2d 1572, 1576 (Fed.Cir.1988) (citing *Mugler*). With respect to the application of the nuisance exception to this case, the Federal Circuit noted, "we may concede as a hypothetical, if Florida Rock produced on its tract a fluid as septic as Kansas then considered beer to be, and proposed to drain it into the Miami drinking water, this could be stopped without compensation." 791 F.2d at 900.

Although defendant's statement of the law is accurate, it does not apply to this case. First and foremost, the Federal Circuit noted that the Corps' decision that plaintiff's proposed activities would pollute the water was a "necessary hook for jurisdiction of the Army engineers, [and the pollution] is not claimed in the district engineer's decision to be by itself very serious." *Id.* at 904. The appellate court characterized Florida Rock as a "moderate and *pro forma* polluter," and distinguished it from "one who wanted to put toxic wastes in drinking water, [who] would encounter a balancing of public and private interests most unfavorable to his position and not likely to result in a compensation award." *Id.*

Second, even if the Federal Circuit's statements were not binding on this court, the court on its own is not persuaded that plaintiff's proposed activities would have constituted a nuisance so as to deny plaintiff its rights to just compensation.

Defendant introduced testimonial and documentary evidence that plaintiff's proposed use of the property would have endangered or destroyed some wetlands.

Defendant contends that based on this evidence plaintiff's proposed activity would have increased the risk of contamination of the Biscayne Aquifer, the sole source of drinking water for the Dade County area, although even defendant does not contend that limestone mining actually would have contaminated the aquifer. No evidence was introduced at trial to support or even quantify this risk.

Notwithstanding this argument, it is clear from the court's aerial visit of the site that the proposed use of plaintiff's property would not have created any significant increase in the risk of contamination posed to the Biscayne Aquifer. The extensive quarries in the area of plaintiff's property belie any claim that a nuisance is involved here. The court observed many operational limestone quarries and existing limestone pits in close easterly proximity to plaintiff's property. Furthermore, defendant concedes that if plaintiff had begun to mine before the 1972 amendments to the Clean Water Act went into effect, plaintiff would have been grandfathered in, and no federal permit would have been required.

Defendant's use of the nuisance exception here only obscures the real question, as well as the government's own interests in denying plaintiff a § 404 permit. The government's stated policy interest is the prevention of development in the vast wetland area at the western edge of Dade County's developed and developing sections. The wetlands there serve to protect and enhance the Biscayne Aquifer. As civilization has grown into this region over the last 100 years, there has been an ever greater amount of pressure on the Aquifer. This is so

because the wetlands filter and recharge the Aquifer, while development has the opposite effect.

No one knows how much danger to or pressure on the Aquifer's ability to remain safe have been created by the last 100 years of development. However, it is not this court's function to decide the acceptable level of pressure or danger. The state or federal authorities well may decide that Dade County's development should be stopped forever at Krome Avenue or allowed to proceed another 100 miles to the west. It is this court's duty to decide which regulatory restrictions require just compensation under the fifth amendment.

Here, it is clear that the nuisance exception to the fifth amendment's requirement of just compensation is inappropriate. Rock mining of the type planned for plaintiff's property never has been considered a nuisance. In fact, it is in this area, as the court observed, the precursor of stylish, if not elegant, residential development. As the pits are mined out they are turned into small lakes. The surface ground formerly covering the limestone is used to raise the ground level so that homes can be built several feet above the mean high water line. This pattern of development extends in a great north-south band along the western edge of the developing Dade County. The eastern edge of this band consists primarily of completed and occupied residential development. The western edge is populated by active limestone mining pits. Plaintiff's claim is occasioned by the fact that when it was about to begin its mining the governmental policy put an absolute limit on this western movement. This decision's correctness must be assumed in the context of a claim for just compensation. However, it has little to do with nuisance

theory, an area developed by the common law courts of England hundreds of years past. Rock mining of the type at issue here is not considered a nuisance in this area. It certainly is not considered one several thousand feet away, where rock mining is proceeding happily apace. The government's uses of this argument, if adopted, would render the concept of a regulatory taking virtually meaningless. It also would severely limit the protection afforded by the fifth amendment, even in the case of a taking by direct physical invasion.

For the foregoing reasons, plaintiff's proposed use of its property would not have constituted a nuisance under *Keystone Bituminous, Mugler,* and *Allied-General Nuclear Servs.* Plaintiff therefore had a legitimate entitlement, but for the wetlands restrictions, to use its property in the manner proposed. As a result, if it is otherwise able to establish that the denial of its permit resulted in a taking, plaintiff should not be required to "sustain[ ] what may well be a permanent obligation to maintain property for public benefit, to carry the taxes and other expenses, and not to receive business income from the property in return." 791 F.2d at 904.

This determination does not call into question the findings of the legislature in enacting the Clean Water Act, nor the determinations of the Corps or other agencies that might have opposed the project. In fact, this determination is consistent with the appellate court's characterization of the Corps' findings. According to the Federal Circuit, "[t]he concern of the district engineer [was] almost exclusively the continued existence of the wetland, not the temporary and moderate pollution incident to the occurrence of actual mining. It would be

forensic semantics to characterize his decision as one against pollution. . . . " *Id.*

All valid statutes and regulations exist for the public welfare. But the assertion that a proposed activity would be a nuisance merely because Congress chose to restrict, regulate, or prohibit it for the public benefit indicates circular reasoning that would yield the destruction of the fifth amendment. "The nuisance exception . . . is not coterminous with the police power itself." *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 145, 98 S.Ct. 2646, 2669, 57 L.Ed.2d 631 (1978) (Rehnquist, C.J., dissenting). It cannot be forgotten that the fifth amendment "is designed not to limit the governmental interference with property rights *per se,* but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church v. Los Angeles,* 482 U.S. 304, 304, 107 S.Ct. 2378, 2380, 96 L.Ed.2d 250 (1987).

As defendant concedes, not all valid § 404 permit denials are insulated from fifth amendment claims. In this case, the court finds no support for defendant's proffered characterization of the proposed use of this property as a nuisance.

Denial of Economically Viable Use of the Land

In *Agins v. Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980), the Supreme Court indicated that a regulation, in that case a zoning law, as applied to a particular property may effect a taking if it does not substantially advance legitimate state interests (citing

Nectow v. Cambridge, 277 U.S. 183, 188, 48 S.Ct. 447, 448, 72 L.Ed. 842 (1928)), or if it "denies an owner economically viable use of his land" (citing *Penn Central*, 438 U.S. at 138 n. 36, 98 S.Ct. at 2666 n. 36). *See also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985).

There is no fixed formula for determining when a regulation or its application denies an owner economically viable use of its land and thereby results in a taking. Rather, the Supreme Court has characterized the analytic process as one relying

> instead on ad hoc, factual inquiries into the circumstances of each particular case. . . . To aid in this determination, however, we have identified three factors which have "particular significance." (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the government action."

Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224-25, 106 S.Ct. 1018, 1025-26, 89 L.Ed.2d 166 (1986) (citations omitted). *See also Keystone Bituminous*, 480 U.S. at 494-95, 107 S.Ct. at 1247 and cases cited therein.

In focusing on the extent to which the government's action has denied plaintiff the economic viability of its property the court may combine the first two of these factors. *See* 791 F.2d at 905. As a part of this analysis, the court must compare the value of the property before the government action with the value after the government action. "[I]f there is found to exist a solid and adequate fair market value . . . which Florida Rock could have

obtained from others for that property, that would be a sufficient remaining use of the property to forestall a determination that a taking had occurred. . . . " *Id.* at 903. This market may be composed of "investors who are real but are speculating in whole or in part." *Id.* The court, however, may not consider "potential end uses or markets when the speculation is so remote or improbable that one would not invest his money in it." *Id.*

Before addressing the value of the plaintiff's property prior to and after the government action, a brief comment on the character of the government action is warranted, although little has been made of it by the parties because of the particular facts and procedural posture of this case.

Character of Government Action

Typically, an inquiry into the character of the government action addresses whether the interference with property involves physical invasion or interference by regulation; interference of the former type has been more likely to be considered a taking than the latter. *See further Keystone Bituminous,* 480 U.S. at 488-89 n. 18, 107 S.Ct. at 1244 n. 18.

In this case, the government has drawn a line in time, and has dictated that covered activity begun after a certain point is restricted. As defendant has conceded, if plaintiff had attempted to mine its property earlier, it probably would have been grandfathered in under the then-existing statutory scheme. Moreover, as the court noted earlier in this opinion, limestone mining operations

that had begun prior to the amendments to the Clean Water Act were ongoing at the time of trial.

It must be kept in mind that the "determination that governmental action constitutes a taking, is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest." *Agins*, 447 U.S. at 260-61, 100 S.Ct. at 2141-42. Although it is permissible for a regulatory entity to determine that conduct begun prior to the effective date of certain regulations is not affected, such a determination may indicate, as it does in this case, that a single plaintiff should not bear a burden that should be borne by the public at large. Thus, to the extent the court has been asked to contemplate the character of the government action in this case, it is a consideration that weighs in plaintiff's favor.

Value Before Government Action

In many cases, the economic impact of the regulation is measured by comparing the fair market value of the property before the government action with the fair market value of the property after the government action. Thus, the litigation on this issue often becomes a battle of real estate appraisers. Typically, real estate appraisers determine and adjust comparable sales to determine fair market values; in the absence of comparable sales, however, other methods for establishing the fair market value are accepted by the courts. *See, e.g., Foster v. United States*, 607 F.2d 943, 951, 221 Ct.Cl. 412, 426 (1979); *Yaist v. United States*, 17 Cl.Ct. 246, 260 (1989) and cases cited therein.

In this case, the court believes there were no comparable sales available. In the absence of such proof, plaintiff presented credible and competent evidence of the property's pre-permit-denial fair market value by adjusting the price it paid for the property in 1972 based on changes in the local economic environment. The court agrees with defendant that acquisition cost is rarely a basis for establishing the value of land prior to an alleged regulatory taking. In this case, however, the acquisition cost was used merely as a starting point for determining the value.[5]

Further, the court is convinced that although this method may not be the ideal one chosen by appraisal experts, it does provide an adequate basis for determining the fair market value of the property prior to the government action. As such, Chief Judge Kozinski's general acceptance of plaintiff's method, as modified somewhat by his calculations as explained in his oral ruling of May 7, 1985, is not clearly erroneous. Because this finding therefore meets the requirements of RUSCC 52(a), and

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[5] Contrary to defendant's assertions, the adjustments from 1972 to 1978 did not have the effect of attributing to the United States the costs of lost opportunity, taxes and inflation. Plaintiff no longer argues that it may recover for the frustration of business expectations, nor could this court accept such an argument. *See* 791 F.2d at 903. Plaintiff's adjustments merely reflect the reality of the changing value of money and realty over time; to accept defendant's argument would undercut the meaning of any method of valuation, including the comparable sales approach, since the reasons for paying a certain sum for a particular piece of property include opportunity value, taxes, and the value of money.

because it was not disturbed on appeal, the pre-"taking" value of plaintiff's property is held to be $10,500 per acre.

Value After Government Action

The great majority of counsel's time and effort spent on remand has been directed at the question of the property's value after the denial of plaintiff's permit applications.[6] Defendant argues that plaintiff has not proven that all economically viable uses would require a fill permit, nor has plaintiff shown that it applied for permits for uses other than mining, nor has plaintiff shown that any such permit applications have been denied. Defendant asserts that plaintiff's taking claim is not ripe because applications for relevant state permits never had been made, citing *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172, 186, 105 S.Ct. 3108, 3116, 87 L.Ed.2d 126 (1985) for the proposition that until an owner has obtained a final administrative decision as to how the applicable rules and regulations will be applied to the property, a taking claim is premature. However, with respect to the federal administrative process, the Corps' denial of plaintiff's § 404 permit application was final. With respect to the state permit applications, there is no legal requirement for a party to

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[6] On remand, the court denied defendant's motion to exclude additional evidence, and heard additional testimony as to the fair market value of the property after the permit denial. Noting its continuing objection to the consideration of additional evidence, defendant argues that even with that new evidence plaintiff has failed to establish that there is no remaining economic use of plaintiff's property after the permit denial. For the reasons stated herein, the court disagrees.

expend time and money on what would clearly be an unnecessary and futile exercise. *Cf. Conant v. United States*, 12 Cl.Ct. 689, 692 ("It would serve no purpose to require claimant to exhaust administrative procedures before seeking judicial review when it is clear that resort to administrative action would be futile.").

It appears to the court, for several reasons including defendant's allegation that the highest and best use for the subject property is investment, that the most important of defendant's arguments is that plaintiff has failed to prove the absence of a market among real and knowledgeable investors aware of all restrictions on the lands.[7]

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[7] In addition to its main arguments, defendant points out that plaintiff's principle, Mr. Edward Baker, believed the property to be worth over $10,000 per acre after the permit denial. Defendant also argues that plaintiff rejected three offers to purchase the property for substantial value after the permit denial. These offers consisted of a letter from an Arizona real estate broker proposing to purchase the tract for approximately $3.5 million, a subsequent letter from the same broker proposing to purchase the parcel in ten-acre tracts for $5 million over an eight-year term, and a contract for the purchase of 160 acres for $325,000 with 20% down and the balance to be paid over ten years. There is no evidence that these offers were made by knowledgeable investors, nor whether the offerors were capable of consummating the purchase; plaintiff's unrefuted testimony was that it did not consider these offers to be "real." Regardless of the actual likelihood of these offers being real, however, neither they nor Mr. Baker's belief as to the value of the property, whether considered on their own or together, proves the existence of a "solid and adequate" market. Nor does the court find any persuasive evidence that there is a market for the property for purposes of hunting, recreation, or scientific study, other than among government entities which might be interested in acquiring the wetlands at the nominal price discussed *infra*.

Although defendant is correct that plaintiff has the burden of establishing the elements of its claim, including the diminution in the property's value, it would be patently unreasonable to require plaintiff to prove the total absence of any value, and more relevant to this case, the absence of a market for the property. This would require plaintiff to prove a negative, a logically impossible task. Moreover, it would be a hurdle which would make an illusion out of the fifth amendment. Instead, plaintiff's initial burden is to produce sufficient evidence of the absence of real value to shift the burden to defendant. Plaintiff in the instant case has met that burden.[8]

A brief review of what previously has transpired in this case is necessary to understand fully the parties' respective positions. The Federal Circuit noted that Chief Judge Kozinski premised his determination that a taking had occurred on a misinterpretation of the phrase "economically viable use." According to the appellate court, 791 F.2d at 901-03, the trial judge erroneously read into the case law the qualification that there be no remaining *immediate* use, and consequently excluded the testimony of the defendant's real estate appraiser that a market existed among knowledgeable speculators who would be "willing to forego immediate income in hope of long-term gain." *Id.* at 902. Instead, Chief Judge Kozinski accepted the testimony of plaintiff's economist, Dr. James C. Nicholas, who, according to the Federal Circuit,

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[8] For a further discussion of the parties' respective burdens of proof, see *Loveladies Harbor, Inc. v. United States*, 21 Cl.Ct. 153, 157-58 (1990).

> testified that "fair market value" subject to the regulation was a myth: the only buyers who would pay any substantial sum for the property were foreigners, unaware of the physical nature of the property and of the legal restrictions on its use, victims of fraud or self-deception.

Id. After indicating its belief that there might well be a market among investors willing to "bet" on the possibility that fill restrictions would be lifted in the future, the Federal Circuit held it was clear error for the trial court to accept Dr. Nicholas' testimony as determinative of the absence of such a market, and clear error not to consider defendant's appraiser's testimony. *Id.* at 903. Consequently, on remand this court was directed to determine whether there existed an actual market among real and knowledgeable investors aware of all restrictions on the land, the existence of which "would be a sufficient remaining use of the property to forestall a determination that a taking had occurred. . . . " *Id.*

(i) Valuation Methods

It must be stressed that the ultimate fact to be proven is the existence or absence of a market among knowledgeable investors, aware of all restrictions on the land. Reiterating the unreasonableness of requiring proof of a negative, the court is satisfied that plaintiff has produced strong evidence of the lack of real knowledge on the part of purchasers. This evidence certainly is sufficient to shift the burden of production to defendant. Defendant, however, overlooks the importance of the purchaser's knowledge.

As the Federal Circuit expressed, the evidence must show "a solid and adequate fair market value." *Id.* at 903. Because fair market values are premised on transactions between *knowledgeable* parties, and because the appellate court stressed this component of the analysis in this dispute, defendant's failure to provide evidence of the purchaser's knowledge renders its testimony unpersuasive.

To fully appreciate the conflict in the parties' positions, a focus on the meaning of fair market value is in order. By industry definition, market value is:

> The most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress.

American Institute of Real Estate Appraisers, *The Appraisal of Real Estate* 19 (9th ed. 1987). Intrinsically linked to the determination of fair market value is a determination of the highest and best use. This is defined by the industry as, "[t]he reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value." *Id.* at 269.

The court is faced with conflicting real estate appraisals, prepared by two highly credible experts. Both hold MAI designations (Member of the Appraisal Institute) from the American Institute of Real Estate

Appraisers, and are certified under the Institute's continuing education program. Both compared the subject property with other acreage within what was identified as the two-by-ten mile strip. The differences in their respective appraised valu of the land and in their determinations of the highest and best use for the property are attributable to differences in methodology, and, ultimately, to a difference in focus.

In brief, plaintiff's expert, with the assistance of a well-qualified statistician and an experienced real estate market researcher, employed a statistical analysis of a census of property holders in the region to determine knowledge and motivation of purchasers of "comparable" property. Defendant's expert identified transactions of property it determined were objectively comparable, largely assumed knowledgeable purchasers if the transactions had been at arms-length, and determined an average per-care price paid. Both appraisers verified the sales, in accordance with the practice of their industry, but plaintiff's appraiser attempted to verify the knowledge of the landowners, while defendant's appraiser verified that the sales were arms-length transactions and, with little exception, assumed knowledge on the part of the purchasers.

Not surprisingly, in light of the different approaches taken, the experts' respective conclusions are different. Plaintiff's expert contends there is no market among knowledgeable investors, and that the highest and best use for the property would be as a site for "future recreational/water management" purposes, at a nominal value of $500 per care [sic] to a government entity. Defendant's expert alleges there is a market among knowledgeable

investors, that the highest and best use for the property therefore would be investment, and claims that a value of $4,000 per acre is appropriate.

If this were a jury case, the court would be required to "screen the proffered potential uses and exclude from jury consideration those which have not been demonstrated to be practicable and reasonably probable uses." *United States v. 341.45 Acres of Land*, 633 F.2d 108, 111 (8th Cir.1980), *cert. denied sub nom. Bassett v. United States*, 451 U.S. 938, 101 S.Ct. 2017, 68 L.Ed.2d 324 (1981) (quoting *United States v. 320.0 Acres of Land*, 605 F.2d 762, 815 (5th Cir.1979)). By analogy, the court sitting as a finder of fact must discount proposed uses that do not meet a "showing of reasonable probability that the land is both physically adaptable for such use *and* that there is a demand for such use in the reasonably near future." *Id.* (emphasis in original) (relying on *Olson v. United States*, 292 U.S. 246, 54 S.Ct. 704, 78 L.Ed. 1236 (1934)). In this case, the court must discount the proposed use of speculation as being neither practicable nor reasonably probable.

It may well be that this land may some day be worth defendant's proposed $4,000 per acre, or $50,000 per acre, or 100 times that, when Miami has 50 million residents in the future. However, while land speculation, dreams of avarice, and real estate promoters may proceed by such rules, this court must value this property by a fair and realistic measure. What it *might* be worth is not an adequate government argument to the present lack of a real market with knowledgeable investors. This is further emphasized by the following excerpt of the direct examination of defendant's expert, Mr. Theodore C. Slack:

Mr. Disheroon: Have you had experience in other areas regarding property of this type?

Mr. Slack: Of wetlands?

Mr. Disheroon: Yes, or just property that is just located far out where there were active real estate market[s]?

Mr. Slack: Yes. One, for example, is Arizona. I do a lot of work out there. Ten years ago, people were buying desert, with no roads, no water, no sewer, no electricity, and they were paying five thousand dollars an acre. I knew they were nuts. But unfortunately or fortunately, I guess, ten years later they were getting fifty thousand dollars an acre for the same land. Scottsdale annexed it and Phoenix has a tremendous population growth and all of a sudden these people made a lot of money. I had to send MAI buttons, so I did not buy any of that land, but those guy[s] did and I suppose they are retired or having lunch with Donald Trump or something, I do not know.

Mr. Disheroon: In your experience, if you were asked to evaluate that property at the time it was in the middle of the desert, using the standards of the appraisal institute where there was an active market but the purpose was holding it for investment, would you have said that there [was] no market value to that property and it was worthless?

Mr. Slack: No. The reason I was out there is I was appraising some of that property. I said people are paying five thousand dollars an acre. I have all these fancy badges on, so I am too smart to do that. If that is what they are paying, that is what it is worth. I appraised it for five

thousand. When I appraised it last year, I appraised it for fifty thousand.

Mr. Disheroon: Time and location are important factors in the future use as to which property may be put?

Mr. Slack: Yes. By the time it was selling for fifty thousand, of course they were building two hundred thousand dollar houses on it. I could not foresee that in 1975 and 1978. People that bought the property could not either. They just knew that it was a growth area, and said, "hey, let us take a shot," and they won.

The Court: Is the lesson to that, irrational speculation sometimes works?

Mr. Slack: I do not know, Your Honor, what is irrational. I think some of the people that have made the most money in the United States [are] saying that more fortunes have been made in real estate than any other form of investment. There is no guarantee. I have bought property and sold it for three times what I paid for it. I have some property in Tennessee that is not worth anymore now, than it did when I bought it ten years ago. You just do not know. I guess that is why they call it "speculative," because it is uncertain.

The Court: I guess for the example of the people that we found to have bought in property outside of Phoenix, that was next to Scottsdale, we might find someone in New York who had bought property in New York, and has the property not worth half of what it was when he bought it.

Mr. Slack: Yes. That is certainly true. I am not the world's biggest investor, but I do some and

> sometimes I do find and sometimes I do not. That is just the way the free market works. It is not a controlled market and nothing is guaranteed.

If the fact that knowledgeable investors thought the Arizona desert was valueless 30 years ago (and it turned out otherwise) can be used by the defendant to validate speculation of the wildest sort as providing an adequate market, then the very concept of *fair* market value is cast aside.

Defendant also takes issue with plaintiff's admittedly novel appraisal procedure. Among its many criticisms, defendant vehemently claims that the survey questionnaire was invalidly designed to elicit responses showing that the landowners purchased the property without knowledge of restrictions on its use and development, and was not intended as an objective measure. In addition, argues defendant, the critical questions did not address whether the purchasers had knowledge at the time of purchase, but, rather, whether they believed they had knowledge of restrictions at the time the survey was taken.

It is true, as defendant points out, that the method used by plaintiff's experts is not part of the typical comparable sales approach employed in eminent domain cases. Usually, it may be adequate to presume knowledge of all legal restrictions on the part of purchasers in arms-length transactions. In this case, however, the parties were aware of the importance placed by the Federal Circuit on the knowledge component. The reason for this is the potential effect on the mandate of the fifth amendment created by South Florida's almost proverbial land

sales tradition. If knowledge of restrictions was not an important component of the evidence in this case, then the protection of the taking clause might well be meaningless in many high growth, rapidly developing areas where widespread land mass-marketing schemes abound. The appellate court must be understood to have intended that a particular inquiry be made into the knowledge of those who make up the potential market. Plaintiff's method, while not a certain one for establishing the existence or absence of knowledge, is a reasonable one under the circumstances.

In the absence of an available vehicle for traveling back through time to 1980, this only could be done by drawing reasonable inferences from what people today believe they know. The evidence in this case indicates that the Corps' jurisdiction over the wetlands and the resulting restrictions on development are more widely known today than they were a decade ago; thus, it is reasonable to conclude that if property owners were unknowledgeable as to the legal restrictions on their land in 1988, when the survey was taken, they were no better informed, and likely worse, when they acquired the property.[9]

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[9] At the risk of obscuring the forest for the trees, the parties spent a great deal of time at trial and in their post-trial submissions attacking and defending the specific questions in the survey and the follow-up telephone inquiries that were made in several instances. When viewing the forest, however, the court is persuaded that the survey results, coupled with the legal reality that no fill is permitted without the Corps' permission, unquestionably indicate that those who acquired the property during the relevant time period cannot be considered to have been knowledgeable purchasers.

The court also would note that, contrary to defendant's implication, purchasers cannot be presumed to have had knowledge on the basis of the representations in their deeds, because unlike restrictive covenants, neither federal statutory provisions nor Corps' regulations would have appeared in deeds.

Plaintiff is correct when it points out the difference between price paid and market value. Because defendant's testimony essentially is nothing more than an informed extrapolation of prices paid, and because it does not sufficiently take into consideration the knowledge of the purchasers, it is not a basis for determining market value or the existence of a market, in this case. It must be noted, however, that this does not mean defendant's method is incorrect as a matter of law; rather, in this particular case, where the appellate court has stressed the importance of a knowledgeable market, plaintiff's method is a more appropriate one. This is especially true given the history of Florida land development.

(ii) Collateral Estoppel

Defendant additionally argues that this court is bound under the principle of collateral estoppel to accept the state court's determinations made in response to a contested tax assessment, *Florida Rock v. Bystrom*, 485 So.2d 442 (Fla.1986), with respect to the existence of a solid and adequate investment market. The doctrine of collateral estoppel is required when:

> (1) the issues to be concluded are identical to those involved in the prior action;

> (2) in that action the issues were raised and "actually litigated"; (3) the determination of those issues in the prior action was necessary and essential to the resulting judgment; and (4) the party precluded . . . was fully represented in the prior action.

DWS, Inc. v. United States, 18 Cl.Ct. 453, 458 (1989) (quoting *Mother's Restaurant, Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1569 (Fed.Cir.1983)).

Defendant's argument fails because the first enumerated requirement, above, is absent. Contrary to defendant's implication, valuation for purposes of state taxation and valuation for determining the scope of the protection afforded by the United States Constitution are not identical issues. Each state expresses unique concerns by the way in which it values property for taxation; as a result, the same property taxed under Florida's provisions may be valued quite differently under New Jersey's, for example. The inviolable mandate of the fifth amendment, however, does not permit such variety. Because plaintiff is not collaterally estopped for this reason, the court has not considered whether the other requirements of the doctrine have been met, nor does the court inquire into the merits of the state court's determination.

(iii) Real Market Issue

Finally, the court would note that it rejects defendant's contention that the Federal Circuit indicated its belief that there was a market made up of knowledgeable investors. The particular passage on which defendant relies is as follows:

> Since the tract was not listed for sale, the $4,000 per acre offer, the frequent inquiries, and the assessed value, must have reflected interest of knowledgeable people, not foreigners or gulls. There may be a question what knowledgeable buyers would have paid, but that they would have paid some substantial figure seems certain.

791 F.2d at 903. In light of the Federal Circuit's direction to determine whether there has been a taking in this case under the proper legal test, and in light of its assertion that it expressly was not serving as fact-finder, the above-quoted passage must be read as referring to what the trial court's conclusion would likely be *in the absence of any further evidence from plaintiff.* This interpretation is supported by the court's reading of the appellate court's opinion as requiring the introduction of additional evidence on remand.

(iv) Summary

After carefully reviewing the appraisal reports submitted, and observing the appraisers and other experts who testified on remand, the court is convinced that the legal requirement that any investment market be among investors with knowledge of the restrictions on the land has not been met. In view of this finding, and in the absence of any other economically viable use for the property, the court accepts plaintiff's position that the value of the parcel remaining after the denial of its permit applications is $500 per acre.[10]

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[10] The court agrees with plaintiff that all real property must have some value. In light of the evidence presented, and in the

Government's Liability

It is well-established that whether the application of a regulation results in a taking is highly fact-specific, and is not subject to analysis by a set formula. *Penn Central*, 438 U.S. at 128, 98 S.Ct. at 2661. It is "a question of degree – and therefore cannot be disposed of by general propositions." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922).

In order to determine whether the economic impact of a regulation on plaintiff's property results in a taking under the fifth amendment, the court must compare the value taken from the property with the value remaining. *Keystone Bituminous*, 480 U.S. at 497, 107 S.Ct. at 1248. For plaintiff to prevail here, the result of such a comparison must indicate more than a mere diminution in value, because "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal*, 260 U.S. at 413, 43 S.Ct. at 159. When "regulation goes too far," however, the fifth amendment requires just compensation. *Id.* at 415, 43 S.Ct. at 160.

In this case, the value of the property in fact has been substantially reduced as a result of government action. The value of the property before the taking was $10,500 per acre; the value of the property after the permit denial

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absence of any contradiction by defendant, the court agrees that $500 per acre is a reasonable nominal value which the property would have to a government entity.

was $500 per acre, resulting in a diminution in value to plaintiff of 95%. The magnitude of the diminution is exacerbated by the fact that the $500 per acre figure represents a reasonable estimate of what a government entity could be expected to pay for the property, and is not the product of negotiations between a willing buyer and seller under no duress.

A substantial reduction in value, however, in and of itself is not a sufficient basis for concluding that a taking has occurred. *See, e.g., Penn Central,* 438 U.S. at 131, 98 S.Ct. at 2662. A further consideration should be the property owner's basis or investment in the property. *Florida Rock,* 791 F.2d at 905. "The owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored." *Id.*

In this case, there is no dispute that plaintiff purchased the property for the sole purpose of limestone mining; there is virtually no other business by which the plaintiff could "recoup its investment or better, subject to the regulation." Simple division indicates that plaintiff paid approximately $1,250 per acre for the entire 1,560 acre tract in 1972. Although this of course does not represent plaintiff's basis in 1980, nor is it representative of what the 98-acre parcel would have cost had it been acquired separately, it is used here to illustrate the very substantial impact on plaintiff's investment. The fact that plaintiff has had to purchase other property to meet its mining needs further illustrates the economic impact.

Damages

When property is taken by the government, the proper measure of just compensation is said to be the property's fair market value at the time of the taking. *See, e.g., Yuba Natural Resources v. United States,* 904 F.2d 1577, 1580 (Fed.Cir.1990) (citing *Almota Farmers Elevator & Warehouse Co. v. United States,* 409 U.S. 470, 474, 473-74, 93 S.Ct. 791, 794, 794-95, 35 L.Ed.2d 1 (1973)) (comparing the measure of damages in permanent and temporary takings).

Although the property retains a residual value of $500 per acre, payment of the full fair market value at the time of taking effectuates the purpose of an action in inverse condemnation, which is to produce a result comparable to the one that would have been reached had the government directly condemned the property. In light of the finding that the fair market value of the property was $10,500 per acre, for the 98-acre parcel, plaintiff is entitled just compensation in the amount of $1,029,000, plus interest from the date of taking.

CONCLUSION

Based on the foregoing, the court concludes that the denial of plaintiff's § 404 permit application effected a taking of 98 acres of plaintiff's property. The parties have agreed that the date of any taking was October 2, 1980. To fulfill the mandate of the fifth amendment, therefore, the court awards plaintiff $1,029,000 plus interest from October 2, 1980. Plaintiff will tender the deed to the 98 acres upon the satisfaction of the judgment.

The entry of judgment will be stayed pending the determination of attorneys fees and costs to which plaintiff is entitled pursuant to 42 U.S.C. § 4654 (1988). Plaintiff is to file any such claim within 60 days from the filing of this opinion.

IT IS SO ORDERED.

FLORIDA ROCK INDUSTRIES, INC.,
Appellee/Cross-Appellant,

v.

The UNITED STATES,
Appellant/Cross-Appellee.

Appeal Nos. 85-2588, 85-2609.

United States Court of Appeals,
Federal Circuit.

May 14, 1986.

Landowner brought Tucker Act action claiming that prohibition on mining imposed by the Army Corps of Engineers amounted to a taking. The Claims Court, Alex Kozinski, Chief Judge, 8 Cl.Ct. 160, entered judgment in favor of landowner and Government appealed. The Court of Appeals, Nichols, Senior Circuit Judge, held that: (1) landowner's election of a Tucker Act action amounted to a concession that Army Corps of Engineers had jurisdiction and that there was pollution of water from the proposed activity; (2) valid regulation may amount to a taking; (3) in determining whether there had been such a diminution in market value as to amount to a taking, court should have considered fair market value of property based on potential sales to those who would be willing to speculate; and (4) court properly refused to determine that land was taken in excess of the 98 acres as to which the specific permit in question had been sought and denied.

Affirmed in part, vacated in part, and remanded.

Fred R. Disheroon, Special Litigation Counsel, Dept. of Justice, Washington, D.C., argued, for appellant/cross-

appellee. With him on the brief was F. Henry Habicht, II, Asst. Atty. Gen.

John A. DeVault, III, Bedell, Dittmar, DeVault, Pillans & Gentry, P.A., Jacksonville, Fla., argued, for appellee/cross-appellant. With him on the brief was C. Warren Tripp, Jr.

Ronald A. Zumbrun and Sam Kazman, Pacific Legal Foundation, Washington, D.C., were on brief, for amicus curiae.

Francis X. Bellotti, Atty. Gen. of Massachusetts, and Nancy S. Marks, Asst. Atty. Gen., Boston, Mass., were on brief, for amicus curiae, The Com. of Mass.

Before DAVIS, Circuit Judge, COWEN and NICHOLS, Senior Circuit Judges, and BALDWIN and BISSELL, Circuit Judges.

NICHOLS, Senior Circuit Judge.

This appeal from the Claims Court, 8 Cl.Ct. 160, confronts us with important and novel issues as to the application of the fifth amendment and, consequently, the Tucker Act, 28 U.S.C. § 1491, to measures by the Secretary of the Army, through the Army engineers under authority of the Clean Water Act, 33 U.S.C. § 1251(a)(1) and ff, to protect Florida wetlands against disturbance by the owner's limestone mining. At times, as by the holding below here, what were intended as mere regulations are converted by force of law into involuntary purchases called "takings." We have the benefit of amicus briefs supporting both sides. We consider it is not legally impossible that the regulatory measures here involved could be a taking, and not impossible that no taking

occurred. The trial judge failed to apply the evidence in a manner correct in all respects to determine whether he had an actual instance of a taking before him. The mere existence of authority to regulate did not itself constitute the taking, and a regulation severely damaging an owner's expectations of realizing profit from his holdings, may not because of that necessarily be a taking either. We remand for determination of the taking question according to right principles, as it would be improper for us to constitute ourselves fact finders and weigh the evidence ourselves.

The act that allegedly constituted the taking, denial of a permit to discharge dredged or fill material into navigable waters and other waters of the United States, applied to but 98 acres out of a 1,560-acre tract, but the cross-appeal urges the whole 1,560 acres were taken because the action respecting 98 acres established a precedent that would govern the rest. This cross-appeal we deny. The award for taking 98 acres was $1,029,000 plus interest from a 1981 taking date. Anticipating that the cross-appeal might succeed, the trial court determined that the award for 1,560 acres would be $10,580,000 plus interest.

Statement of Facts

The plaintiff/appellee company, Florida Rock Industries, Inc. (Florida Rock), is a large-scale miner of limestone, which it extracts for conversion into aggregates for the construction industry. Such aggregates are basic material for a variety of concrete products. There are large

deposits of limestone in South Florida, but they are rapidly becoming unavailable owing to the rapid growth of the densely populated area. Florida Rock purchased the 1,560 acre tract in question in 1972, paying $2,964,000. The sole purpose was to obtain its limestone deposits for extraction, and no other use, or sale, has ever been considered.

The tract is in the portion of Dade County, Florida, that lies west of the city limits of Miami. Krome Avenue borders its western side and the Tamiami Trail (Route 41) is one and one-half miles to the south. The built-up western residential suburbs of Miami are growing rapidly in its direction, and industrial activity is already visible from the tract itself. The ground is wet, frequently flooded by the state in its control of the water supply, and is part of the Everglades according to the map, but excluded by road, canal, and levee construction. The area is criss-crossed with state-owned canals. The surface is, according to the trial judge, of attractive appearance with variegated vegetation, a habitat of redwing blackbirds, swallows, snipe, American egrets and heron, as well as fish. Defunct vegetation, matted and rotting, lies above the limestone. They are wetlands that recharge the Biscayne aquifer and filter and purify the ground water, if left undisturbed.

It is conceded that before the 1972 amendments to the Clean Water Act, *supra*, Pub.L. No. 92-500, Florida Rock had the local zoning classification requisite to allow it to mine the limestone and needed no consent by the Federal Government. The amendments followed the acquisition and, according to the trial judge, Florida Rock need not have foreseen them. Actually, because of a slump in the

construction industry, Florida Rock allowed the land to remain untouched, though it paid the taxes on it, until 1978, and then commenced to mine. The Army engineers learned of this and stopped it with a cease and desist order. Florida Rock, on October 1, 1980, applied to the Army engineers for a section 404 (33 U.S.C. § 1344) permit to cover 98 acres only. This was estimated to suffice for three-years production, and the Army engineers refused to consider more. Florida Rock would have preferred a permit for the whole 1,560 acres, all of which it meant to mine eventually, but cut down the scope of the application to obtain consideration which would otherwise have been refused.

The Army engineers gave notice of the application to interested federal agencies such as the EPA, the National Park Service, and the Fish and Wildlife Service, to the state, and to Dade County. All urged objections focused primarily on the irremediable loss of wetland, and in the case of some, to water pollution in the form of temporary turbidity caused by the mode of mining proposed, the only feasible method Florida Rock knows of. This is to place a mechanism called a "drag line," on solid ground, remove the muck overlay, dump it temporarily on the ground, remove the limestone thus made accessible with aid of blasting as necessary, dump some of the previously removed limestone or muck into the hole to make a solid foundation to which the "drag line" can be moved, and commence another phase. As the hole would be filled with water, dumping the fill into it would produce temporary pollution by turbidity which, however, would not be a menace to the drinking water. Dade County, if the permit were to be granted despite its recommendation,

would require controls to confine the turbidity to 50 feet. It is clear from the administrative file that the temporary pollution was of primarily legal importance as a source of federal jurisdiction, and the real concern was the threatened loss of valuable wetlands, which rendered a community service whose benefits extended far beyond Florida Rock's own property. The 98 acres, after removal of all limestone, would consist mostly of a deep lake or pond which, if environmentally harmless, was of no value either.

Dade County pointed out that Florida Rock would need various documents from it, including a Tree Removal Permit, and should make certain agreements with the county. The engineers, respecting their jurisdiction, pointed out that their definition of "waters of the United States" in 33 C.F.R. § 323.2(a)(3) includes "wetlands * * * the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters."

Under date of October 2, 1980, after careful consideration, the district engineer determined that the permit would not be in the public interest, and denied it. His findings are our source of the facts stated above, which we take as given.

Proceedings Below

This lawsuit in the Claims Court followed. The "liability" and "damages" phases of the litigation were severed according to immemorial custom of that court and its predecessor, the Court of Claims. The plaintiff introduced evidence of its investment in the property, its

intentions respecting use of it for mining with its anticipated profit therefrom, and argued that, if the property could not be mined, it had no viable economic use whatever. The circumstances of the permit application and its denial were of course before the court. It appeared that since the permit denial there had been numerous inquiries about possible sale of the property by Florida Rock and one offer of $4,000 an acre. Florida Rock rejected everything, still wishing only to mine, and believing the property to be much more valuable than the offer, on the hypothesis, presumably, of either the restraints being lifted or the litigation resulting in the government's being held a taker. The value theory of Florida Rock was that the property before permit denial had a use value based on the owner's anticipated profits, and after the denial no "use value;" that fair market value subject to the restriction was a myth, potential buyers being made up of gullible persons, often foreigners, who would pay anything for acreage in South Florida, and more hard-eyed types who would also buy anything if the price was sufficiently trifling. Florida Rock offered, however, no testimony by real estate appraisers. It introduced testimony that the logic of denying the permit for 98 acres would preclude a permit for any other part of the tract.

The government produced a qualified real estate appraiser who testified that there was a fair market value remaining; he assigned $5,466,000 to the 1,560 acres in this case. The hypothetical willing buyers would not necessarily be fraud victims: he tried to disregard them though admitting they existed. The buyers would be aware that rock mining was effectively prohibited and

that other development was likewise not then feasible. Their motivation would be a hope the regulation would change. Other government evidence was consistent. The Dade County assessed value for tax purposes was $4,157,800, but this was contested.

Since the oral argument, we have received from appellant's counsel copies of a decision of the District Court of Appeals of Florida, Third District, styled *Florida Rock Industries, Inc. v. Franklin B. Bystrom, Dade County Property Appraiser, et al.*, 485 So.2d 442 (1986). This material is on Lexis and Westlaw. Filed February 25, 1986, it reflects appellate and trial court affirmance of the action of the Dade County appraisers in assessing the 1,560 acres, the subject of the appeal before us, as of January 1, 1982, at a fair market value of $4,089,950. We do not consider it as evidence of any facts or as part of our record. We cite it, *infra*, as interesting and relevant case authority, though, of course, not a binding precedent in this court. Upon our remand, if this opinion is offered, the trial court will have to determine what use to make of it.

In an oral decision rendered from the bench, May 7, 1984, the court (Chief Judge Kozinski) determined that the permit denial promoted the public health and welfare; "we have to take it as given that this was a proper exercise of statutory and regulatory authority." Counsel assured him that there was no issue as to these matters in the case. "The Corps' denial of permit to rock mine the property advances a legitimate public purpose." The court responded: "If you were challenging that, you would be in District Court." He held that "the denial of the permit for the 98 acres was a taking because it left the

plaintiff no reasonable economic uses for the property." He left open at that time whether the rest of the tract was taken. In general he accepted the testimony of the plaintiff's economics expert that there was no other viable use. He confirmed this with what he saw when he viewed the property and noted defendant's own appraisal expert's admission there was no residential demand in the wetlands area. He addressed the defendant's evidence there was a market among knowledgeable investors who accepted the fact they would not be able to use the property for a while, saying that the law looks to the uses it can be put to, and a possible sale to one accepting a period of idleness, but hoping for a future change in conditions, is too speculative. He remarked that the idea a sucker was born every minute had been superseded by the idea one could sell swamp land in Florida to someone at almost any time.

As he had promised, but a year later, May 6, 1985, the trial judge followed up with a written opinion, 8 Cl.Ct. 160 (1985). As it is published, we need not set it forth in detail; it enlarges upon and elaborates the oral conclusions for the most part. It finds that as of the time of permit application, Florida Rock had all the necessary permits from state and local officials. One feature is new. The opinion, to refute defendant's argument that the denial stopped threatened harmful pollution which could be done without compensating the would-be polluter, undertakes to show that in fact the anticipation that the pollution would occur was unfounded, and finds as a fact that the proposed mine would not have polluted the water supply. He had previously determined that the denial was "a proper exercise of statutory and regulatory

authority" which it could hardly have been if the engineers had not reasonably anticipated that some pollution would occur, enough to warrant the exercise of federal jurisdiction at least. This part of the opinion therefore reflects a drastic change of position.

The trial as to damages was conducted before May 6, 1985. On May 7, 1985, the judge reassembled counsel to hear him state his conclusions orally on the "damages" phase, on which he had now heard a large amount of new evidence. He ultimately concluded that only 98 acres were taken. He rejected the plaintiff's evidence based on the profit anticipated from sale of the limestone expected to be extracted from the property and instead deduced a value from actual sales of other property in the same neighborhood, similar in containing limestone deposits, but different in that extraction of the limestone was permitted. He concluded the award for 98 acres should be $1,029,000, *i.e.*, $10,500 an acre including damage to the remainder of the tract. If, on appeal, it should be held the whole 1,560 acres were taken, the award would be $10,580,000, he found. Interest would run from the taking date, October 2, 1980, at rates established in the court's order. Defendant's obligation to pay is conditioned upon tender by plaintiff of a quit claim deed in proper form for the 98 acres.

Discussion

Appellant/Defendant supports its appeal with three lines of argument, first, that the denial of the permit did not constitute a taking under the fifth amendment, second, that the court below engaged in an improper review

of public interest factors, and third, that in establishment of the award the value of the property for rock mining should not be considered, *i.e.*, the property should be valued as already subject to the permit denial asserted to constitute the taking. We address defendant's second issue first because, in our view, it raises a threshold question as to the jurisdiction of the Claims Court which we should define before we go further.

I

To repeat, the Claims Court reviewed the evidence and found as a fact that the proposed limestone mining would not pollute. This would appear to be an issue as to the jurisdiction of the Army engineers to regulate the activity in question. Under the authority relied on by them, 33 U.S.C. § 1344, permits can be required for discharge of pollutants, including rock and sand, *see* definition, 33 U.S.C. § 1362(6), into federal waters. It is clear from both the district engineer's decision denying the permit, and the government's brief and oral argument before us, that this is the sole basis in law for the Army engineers taking action. Absent pollution, as defined in the statute, the preservation or destruction of the instant wetlands would be a state or local issue only. The question of "public interest," as addressed in the district engineer's decision, is far broader and involves what he described as grave dangers to the environment over a wide area and not at all dependent on pollution. Should the plaintiff discover some means of removing the limestone without putting any rock or sand in government waters, the "public interest," as stated by the district engineer, would hardly be different at all if the wetlands

were still eliminated. It was not contended the "pollutants" would be more than temporary turbidity, and the possible long-term harm by it would be minimal or nonexistent. One, therefore, must, in considering a document such as the district engineer's decision in issue, distinguish very sharply between "jurisdiction" and "public interest" considerations. Clearly the challenge by the court below to the possibility of pollution has to do with the jurisdiction of the Army engineers to grant or withhold the permit in question, not to the broad range of "public interest" issues considered and applied by them when they deem they have jurisdiction. The finding by the trial court that there would be no pollution therefore attacks indirectly the right of the engineers to apply their conception as to the far weightier "public interest" issue.

Defendant further says, and we think it is indisputable, that the proper way to challenge the decision to grant or withhold the permit would be under the Administrative Procedure Act (APA), 5 U.S.C. § 702 and ff. If there was no pollution, even giving due weight to the contrary determination, as held in *Di Vosta Rentals, Inc. v. Lee*, 488 F.2d 674 (5th Cir.1973), *cert. denied*, 416 U.S. 984, 94 S.Ct. 2387, 40 L.Ed.2d 761 (1974), then the Army engineers had no statutory authority to act. The Tucker Act suit in the Claims Court is not, however, available to recover damages for unauthorized acts of government officials. *Armijo v. United States*, 663 F.2d 90, 229 Cl.Ct. 34 (1981); *NBH Land Company v. United States*, 576 F.2d 317, 217 Cl.Ct. 41 (1978). What is meant by authority in these premises is aptly illustrated by *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 287 (1922) where Army ordnance officers fired heavy coast

defense guns over the plaintiff's hotel land. Justice Brandeis, dissenting, denied that the officers had authority to acquire an interest in hotel lands, but Holmes, for the majority, held that whether they had authority to fire the guns was the decisive authority question. As to how authority is determined, *see also Armijo v. United States, supra,* and *Drakes Bay Land Co. v. United States,* 424 F.2d 574, 191 Cl.Ct. 389 (1970). In the instant case, therefore, the district engineer did not need authority to acquire the 98 acres he is held below to have acquired on behalf of the United States, but he did need, or rather plaintiff needed him to have, authority to regulate the proposed mining as a *de jure* pollution, however minimal, of federal waters. In *Armijo v. United States,* 663 F.2d at 93, the Court of Claims said of regulatory taking cases justiciable under the Tucker Act "[i]n such cases the characteristic feature is the defendant's use of *rightful* property, contract, or regulatory rights to control and prevent exercise of ownership rights the defendant is unwilling to purchase and pay for." [Emphasis supplied.] In stating, therefore, "we have to take it for granted that this was a proper exercise of statutory and regulatory authority" the court recognized the limits of his role in a taking case, and in assuring him that "the Corps' denial of permit to rock mine the property advances a legitimate public purpose" counsel stipulated that such an issue was not before the court for adjudication. Logically, a decision that there was no threatened pollution does not support an award of $1,029,000. It would support either a dismissal of the complaint or a transfer of the case to a court having APA jurisdiction.

In *Deltona Corp. v. United States*, 657 F.2d 1184, 228 Ct.Cl. 476 (1981), *cert. denied*, 455 U.S. 1017, 102 S.Ct. 1712, 72 L.Ed.2d 135 (1982), the Court of Claims considered permit denial issues under the Clean Water Act, of the same general kind as here. The claimant, before its Court of Claims suit, had actually litigated its issues as to the validity of permit denial in an APA suit, and a United States District Court had upheld the denial in all respects. In that context, the court held that the propriety of the permit withholding was "given" in the Tucker Act suit. We now hold that the election of a Tucker Act suit, without a previous test of validity issues under the APA, accomplishes the same result because of the necessity of conceding the engineers' authority to act. In defending, the government may deny the authority and in that way authority could become an issue in a Tucker Act taking case.

Apart from the foregoing, the unexplained switch in the trial court's position appears improper under the Law of the Case doctrine. *Yachts America, Inc. v. United States*, 779 F.2d 656, 659-60 (Fed. Cir.1985); *Northern Helex Company v. United States*, 634 F.2d 557, 561-62, 225 Ct.Cl. 194 (1980); *United States v. Turtle Mountain Band of Chippewa Indians*, 612 F.2d 517, 519-22, 222 Ct.Cl. 1 (1979). He was identified, during his chief judgeship, with the practice of delivering orally from the bench opinions and fact findings in complex cases, saving time and conserving judge power. Often, as here, he undertook to answer questions so that his position would be thoroughly understood by counsel, and future proceedings in the case would be governed accordingly. The discussion here referred to occurred during such a question and answer period. The

proceedings were recorded with care in the trial transcript. Between them and the retraction in the May 6, 1985, decision, the trial on damages occurred. We would not think of applying law of the case to mere colloquies between court and counsel, but this was more and different. We think that when an oral presentation by a judge is given the prominence it enjoyed here, it, or the transcript of it, should have the same dignity as written findings and conclusions would have if they existed.

A good deal is said in this case about the apparent indifference of the Army engineers and their advising agencies in the United States Government to the loss of a valuable asset on the part of Florida Rock, one in which substantial capital was invested. Whether or not able counsel ultimately extricate the government from becoming an involuntary purchaser, it would seem officials who have studied all other aspects of their exercise of regulatory authority with the care the administrative record reveals, would give some thought to that. They appear to have believed it was enough to tell Florida Rock it could get its limestone elsewhere, disregarding the fact that in this tract it had invested its capital. Yet apparent official unwisdom does not make a constitutional violation. If one otherwise would have occurred here in the form of a taking without just compensation, it is cured by the Tucker Act and a more cautious construction of the Clean Water Act is not legally required. *Cf. United States v. Riverside Bayview-Homes, Inc.*, ___ U.S. ___, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985).

Accordingly, the inquiry whether and finding that the proposed activity would not pollute, was erroneous. It requires vacating and remanding because we cannot

tell to what extent it influenced the holding that the denial of the permit constituted a taking.

II

We can, therefore, turn to the ultimate issue in this case, which is whether duly authorized and lawful acts of the Army engineers, denying a permit under 33 U.S.C. § 1344, constitute a taking and subject the United States to money liability in the Claims Court under the Tucker Act.

Defendant no longer argues, as it did below, if the regulation is lawful it cannot constitute a taking; in that event, it was once said it was not an exercise of the power of eminent domain but of the police power or some other different source of authority. This argument got its start in *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887), much discussed below, in which the Kansas legislature, having determined that beer was an obnoxious and toxic beverage, prohibited its manufacture in the appellant's brewery, rendering the brewery, of course, of no value. While the court below deemed *Mugler's* precedential authority much abated, we may concede as a hypothetical, if Florida Rock produced on its tract a fluid as septic as Kansas then considered beer to be, and proposed to drain it into the Miami drinking water, this could be stopped without compensation. But the scope of permissible regulation has much increased since 1887 and it is no longer asserted that a regulation, by its very nature as a regulation, cannot be an exercise of eminent domain. The holding or plain implication of *United States v. Riverside Bayview-Homes, Inc., supra*, is that a regulation

under the Clean Water Act can be a taking if its effect on a landowner's ability to put his property to productive use is sufficiently severe. *See* statement of Justice White, 106 S.Ct. at 459 n. 4. The Clean Water Act in its present form, of course, goes far beyond the concerns of navigation, and such concerns are not implicated in this case, but in any event, the effect of *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979) is that the old "navigation servitude," often used to excuse what looked suspiciously like takings, is no longer available for that duty in regulatory taking cases. Defendant, however, invoked the navigation servitude to excuse a regulation under the Clean Water Act that completely denied to the owner of a small island, any economic use of it, but the Court of Claims in *Laney v. United States*, 661 F.2d 145, 228 Ct.Cl. 519 (1981) held that this could be a taking, and a summary judgment holding it could not be was denied. This court has held that a taking can occur by a valid regulation with no physical invasion. *Skaw v. United States*, 740 F.2d 932 (Fed.Cir.1984). Under these authorities, the question has got to be faced whether the impact of the regulation here involved was sufficiently severe under the facts, as undisputed or as found, and the unchallengeable legality in this proceeding of the regulatory act here involved, does not answer the question or even lead towards the answer. In *Laney*, too, the legality of the regulation under the Clean Water Act was conceded.

III

The Supreme Court has recently restated its standards for determining when a regulation constitutes a taking. It says:

> [W]e have eschewed the development of any set formula for identifying a "taking" * * * and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case. * * * To aid in this determination, however, we have identified three factors which have "particular significance:" (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the government action."

Connolly v. Pension Benefit Guaranty Corp., ___ U.S. ___, ___, 106 S.Ct. 1018, 1025, 89 L.Ed.2d 166 (1986).

The fifth amendment, as backed by the safety net of the Tucker Act, does not find a taking in a mere denial of the "highest and best use," *i.e.*, most profitable use, that would be available in the absence of regulation. It was so held in considering a Clean Water Act regulation in *Deltona Corp. v. United States*, 657 F.2d 1184, 228 Ct.Cl. 476 (1981), *cert. denied*, 455 U.S. 1017, 102 S.Ct. 1712, 72 L.Ed.2d 135 (1982); *Jentgen v. United States*, 657 F.2d 1210, 228 Ct.Cl. 527 (1981), *cert. denied*, 455 U.S. 1017, 102 S.Ct. 1711, 72 L.Ed.2d 134 (1982). The regulation may allowably have some adverse effect on the market value, as of course is almost inevitable if the most profitable use is prohibited. *Andrus v. Allard*, 444 U.S. 51, 66, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979); *Penn Central Transportation Co.*

v. New York City, 438 U.S. 104, 131, 98 S.Ct. 2646, 2662, 57 L.Ed.2d 631 (1978). In cases of relatively recent date, *e.g.*, *Penn Central, supra*, the decision of *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) is often referred to as an instance of truly spectacular reduction in value, from $800,000 to $60,000, caused by the regulation, which was held valid. However, this was just an allegation, not a finding, and the case appears to belong to the period when it was held a valid "police power" regulation could not also be an exercise of eminent domain. The case generally considered to have broken with this analysis came later: *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). In that case, Justice Brandeis' dissent cites *Mugler v. Kansas* and *Hadacheck v. Sebastian* and points out quite clearly how the Court is breaking with its precedents. There is no fixed formula to determine how much diminution in market value is allowable without the fifth amendment coming into play. We are not cited to, nor have we found, cases comparing the owner's investment or basis with the market value subject to the regulation and applying any rule or formula with respect thereto, but we deem that a relevant consideration for exercise of a value judgment.

The court below relied on statements that a regulation was a taking if it "denies an owner economically viable use of his land" citing *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 296, 101 S.Ct. 2352, 2370, 69 L.Ed.2d 1 (1981);* *Agins v. City of*

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*The Court cited *Hodel* for a proposition other than the portion of *Hodel* relying on *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), overruled in *Garcia v. San*

Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). It found as a fact that such denial occurred. This finding seems not clearly erroneous only if immediate use is meant. Defendant's suggestion of other immediate uses we deem obviously mere window dressing in light of its own expert witness' concession that a "willing buyer" subject to the regulation would have to be, and would be, one who expected to put the property to no immediate use. The position of the court was that if there was, under the regulation, no allowable and practicable immediate use, this established a taking regardless of the impact of the regulation on fair market value, even if it had no impact. Defendant said and says that a fair market value was real and its indications should govern.

This issue could not become a genuine controversy in most other regulatory contexts. In the special locale of the property involved, and special facts of this case, it does. Plaintiff offered no real estate appraisal expert to support its taking claim, but its economic expert, Dr. Nicholas, testified that "fair market value" subject to the regulation was a myth: the only buyers who would pay any substantial sum for the property were foreigners, unaware of the physical nature of the property and of the legal restrictions on its use, victims of fraud or self-deception. Defendant's expert, Mr. Cantwell, a qualified real estate dealer, testified that there was a fair market value subject to the regulation, as above set forth, the "willing buyers" of the conventional value formula being investors willing to forego immediate income in hope of long-term gain.

Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985).

The locale makes the government theory more plausible than it might otherwise be. South Florida has long enjoyed renown as not only a place where the gullible are fleeced, but also one where far-seeing investors realize fortunes. With the proximity of the huge and growing metropolis of Miami, expanding too in that specific direction, there can be no telling what future Miamians will want to use the instant tract for, still less what they will be willing and able to pay. Mineral land in the mountains or deserts may well be foreseen to have no possible future use except for production of minerals. This land is different and the trial judge recognized as much when he got to the "damage" phase for he found that the property would have substantial residual value, in view of its location, with all the minerals removed; thus a "willing buyer" would pay more than the mere value of the land as mineral land.

Of course, we take it for granted, as Mr. Cantwell did, that the "willing buyer" of the market value formula has got to be one who is correctly informed about the physical character of the land, as well as legal restrictions on its use. He tried to disregard what those who came to be fleeced might pay.

IV

Thus, we have set up for adjudication a contest for employment as a test between immediate use value or nonvalue and fair market value. In *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962), it is held that without evidence of a diminution in fair market value, a prohibition of mining on a tract cannot be

held a taking. In *Florida Rock Industries, Inc. v. Bystrom, supra,* the Florida court holds that the lack of any immediate use of or for land does not exclude determination of its fair market value by analysis based on comparable sales of similarly restricted land. Slip op. at 8. Our trial court, as we read it, selected the immediate use value because it thought it prescribed by the language of the Supreme Court, read as saying that a denial of an *immediately* viable use is a taking, regardless of any fair market value analysis. No such analysis appears to have been before the Supreme Court when it gave such weight to such denial in the cases cited. We doubt very much whether the Court ever meant to say, or would have said, that a denial of any *immediately* viable use must be a taking even though it had no effect on the fair market value of the property. The further reason for the Claims Court's election was that it believed Dr. Nicholas that the only "willing buyers" were victims of deception, and disbelieved Mr. Cantwell that there were serious and well-informed "willing buyers."

We do not perceive any legal reason why a well-informed "willing buyer" might not bet that the prohibition of rock mining, to protect the overlying wetlands, would some day be lifted. The statute would not have to change, only the perceptions of the Army engineers. One who remembers when wetlands were called swamps, when their draining or filling was deemed progress, and when their main environmental impact was in the production of noxious disease-bearing mosquitos, and who has observed their present status, will not be astonished if some day a mosquito bred in a swamp bites someone

and infects him with malaria, and the old beliefs revive. Not only do we take as given, but we are impressed by, the wealth of scientific information that went into the district engineer's decision. He had light not available to our forebears. By the same token, our descendants may know things we do not even suspect. There is nothing so certain in life as that all certainties become uncertain, and some are replaced by their opposites. One who invests in land on this faith may be a speculator, but he is not on that account a gull.

Normally an appellate court accepts a trial court's election of whom to believe among conflicting testimony. Due to the different occupations of Dr. Nicholas and Mr. Cantwell, however, and their consequently different opportunities to perceive how the market operates, and who the "willing buyers" are, we think that the court's acceptance of Dr. Nicholas' testimony is clear error. We are left with a profound conviction that a mistake has been made. Since the tract was not listed for sale, the $4,000 per acre offer, the frequent inquiries, and the assessed value, must have reflected interest of knowledgeable people, not foreigners or gulls. There may be a question what knowledgeable buyers would have paid, but that they would have paid some substantial figure seems certain.

The trial court also invoked the rule that damages must not be speculative, by analogy as he was not ascertaining damages at that point. This rule, however, means that the court must not, itself, speculate, *i.e.*, guess, about potential end uses or markets when the speculation is so remote or improbable that one would not invest his

money in it. It does not exclude consideration of a relevant market made up of investors who are real but are speculating in whole or major part. *Florida Rock Industries, Inc. v. Bystrom, supra,* 485 So.2d at 447. Anyone who buys mineral property is speculating to a large extent, and so is even to some extent one who buys "blue chip" securities. *See* Orgel *Valuation Under Eminent Domain* § 31 (2d ed. 1953).

Whether based on a belief that a use value analysis was required, or on a belief that the only serious bidders for the property subject to the restriction were fraud victims, or on a belief the other serious informed bidders were speculators, the exclusion from consideration of defendant's testimony as to the potential market was clear error or error, and highly prejudicial to appellant. We are of the opinion that Mr. Cantwell's testimony, if considered and believed, established the existence of a market in which Florida Rock could have disposed of the property and mitigated the severity of the regulatory action here involved, and the court should have considered such a possibility. Indeed, if there is found to exist a solid and adequate fair market value (for the 98 acres) which Florida Rock could have obtained from others for that property, that would be a sufficient remaining use of the property to forestall a determination that a taking had occurred or that any just compensation had to be paid by the government.

The court's methodology is objectionable for the further reason that, by dispensing with the fair market value test in determining the occurrence of a taking, it makes the case improperly one to recover for frustration of business expectations. A taking is founded on the fact

that Florida Rock is prevented from doing a profitable business in the extraction and sale of its limestone. Yet frustration in performance of even an existing contract is not a taking of contract rights, *Omnia Commercial Co. v. United States,* 261 U.S. 502, 43 S.Ct. 437, 67 L.Ed. 773 (1923) still less a hope of future profitable contracts. This case is cited and followed in *Connolly v. Pension Benefit Guaranty Corp., supra,* our latest Supreme Court pronouncement. *Cf. Kimball Laundry Co. v. United States,* 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949) in which, in the case of a temporary taking some injury to business is allowed to be awarded, with a careful explanation that this would not be so of a permanent taking. If, therefore, the award here was for a temporary interruption of production, the rule might be different.

V

According to *Agins v. City of Tiburon,* 447 U.S. at 261, 100 S.Ct. at 2141, the question of identifying a regulatory taking involves a "weighing of private and public interests." What is called the "seminal decision" in *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) is cited as illustrative. There the challenged zoning laws were held to bear "a substantial relationship to the public welfare, and their enactment inflicted no irreparable injury upon the landowner." 447 U.S. at 261, 100 S.Ct. at 2141.

Conducting a similar weighing here, the preservation of wetlands bears a substantial relationship to the public welfare as perceived by the best lights of our time. The pollution of the water, though the necessary hook for

jurisdiction of the Army engineers, is not claimed in the district engineer's decision to be by itself very serious. The decrease in water quality due to turbidity will be "short term." "Water pollution does not appear to be a problem" at (water supply) wells adjacent to similar pits. No difference in water quality appears. Thus, when appellant characterizes the regulatory action as one to prevent pollution, it is really elevating form over substance. The concern of the district engineer is almost exclusively the continued existence of the wetland, not the temporary and moderate pollution incident to the occurrence of actual mining. It would be forensic semantics to characterize his decision as one against pollution, and the action has to be analyzed more carefully to weigh the private and public interests.

The Clean Water Act covers many types of pollution. We may assume, arguendo, that one who wanted to put toxic wastes in drinking water would encounter a balancing of public and private interests most unfavorable to his position and not likely to result in a compensation award. Denial of the permit frustrates him in doing harm. On the other hand, a moderate and *pro forma* polluter such as Florida Rock does no harm. Denial of the permit requires it to maintain at its own expense a facility, the wetlands, which by presently received wisdom operates for the public good, and benefits a large population who make no contribution to the expense of maintaining such facility. This appears to be a situation where the balancing of public and private interests reveals a private interest much more deserving of compensation for any loss actually incurred. The private interest, unless relieved by

a Tucker Act award, sustains what may well be a permanent obligation to maintain property for public benefit, to carry the taxes and other expenses, and not to receive business income from the property in return.

VI

Defendant says there was no taking because the 98 acres held taken are only a small part of a single tract of 1,560 acres, the rest not taken, and no restriction arising from the denial of the permit applies to them. Such a contention had dignity and was of decisive importance in the cases of *Deltona, supra,* and *Jentgen, supra,* but there the Army engineers considered the entire tracts and determined that portions thereof could be developed as proposed. Here the Army engineers considered only the 98 acres. As to the rest, it is and, for the immediate future, remains illegal to mine without a permit in the only fashion Florida Rock considers feasible. Florida Rock could apply seriatim for permits to allow mining on the rest, and inevitably, from the evidence and the findings, have them denied. We do not think that the mere possibility a permit might be granted, like the possibility one might put a pot of water on a hot stove and have it freeze, is a reality requiring us to deem that viewing the 1,560 acres as a whole, Florida Rock might in theory mine a lot of limestone, or perhaps market a housing development as appellant also would have us speculate.

The near certainty that the pot of water will boil is what justifies Florida Rock's cross-appeal in which it says, if it can't, as a practical or legal matter, mine on the rest of the property, the rest is taken, and the judgment

should be modified to provide an award in the sum stated in the trial court's alternative finding. There are, however, answers to this. In the first place, if the Army engineers adverted to the possibility of making the government an involuntary purchaser at all, they must have supposed the exposure would be much reduced by confining their determination to a test case of 98 acres. Such an interest in controlling the extent of exposure is entitled to some judicial respect. In the second place, since the 98 acres sufficed for Florida Rock's needs for three years, there is no likelihood that Florida Rock would, if allowed, mine over 98 acres in three years. Therefore, the frustration of any viable economic use, constituting the alleged taking, does not as to the excess commence until over three years have passed. If the taking legally occurs at the start of the three years, interest starts to run, which seems unfair when Florida Rock never expected to derive income from it. Thirdly, the real injury becomes more speculative as the time of intended development becomes more distant. Fourth, Florida Rock might have precipitated takings by filing a series of applications for 98-acre segments of the whole, but if the Army engineers refused to consider them, the refusal would be reviewable under the APA and not under the Tucker Act. We think it is very questionable whether a refusal to consider applications relating to remote periods would be deemed an abuse of discretion and, on the other hand, to hold the mere enactment of the statute a taking would be contrary to *Hodel*, *Agins*, and indeed, just about all the recent Supreme court authorities.

If the instant case, after the remand, still results in a substantial award against the government, the Army

engineers probably would want to consider whether the continued protection of the 1,560 acres of wetlands was worth the damage to the public fisc. This right should be preserved to them.

VII

Appellant also attacks the decision below on the curious ground that the comparable sales, used as the trial court's base to compute the fair market value of the land it held taken, were sales of rockland near the Florida Rock site, but free of government restrictions on mining. The law, says appellant, requires land taken to be valued subject to all existing legal restrictions on its use. Thus, if the regulation constituting the taking reduced the value of land subject to it to zero, the very severity of the economic injury would relieve the taker of all but nominal fifth amendment liability. We suppose appellant added this contention to provide a little humor for an otherwise serious and scholarly brief, and say no more about it.

Conclusion

We hold that the trial court committed an error of law in investigating and determining, notwithstanding the district engineer's finding that there was at least some *de jure* pollution to be anticipated from Florida Rock's project, in reality there was none. The apparent purpose was to sustain the assessment of taking liability for injury inflicted by a regulation, but the alleged taker had a right, in the Claims Court, to have the claim assessed on the basis that its regulatory action was valid and correct in all

respects. The trial court also erred in assessing the severity of economic impact exclusively on the basis of a use value formula, refusing to consider any fair market value remaining in the land and realizable by the landowner. We think, however, the record reveals a substantial possibility that a taking should be held to have occurred under correct legal standards, so a remand is necessary. On remand, the court should consider, along with other relevant matters, the relationship of the owners's basis or investment, and the fair market value before the alleged taking, to the fair market value after the alleged taking. In determining the severity of economic impact, the owners's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored.

We affirm, however, the trial court's refusal to determine that land was taken in excess of the 98 acres as to which the permit was sought.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

FLORIDA ROCK INDUSTRIES, INC., Plaintiff,

v.

The UNITED STATES, Defendant.

No. 266-82 L.

United States Claims Court.

May 6, 1985.

Plaintiff brought suit claiming that denial of a dredge and fill permit by the Army Corps of Engineers constituted a taking of plaintiff's property. The Claims Court, Kozinski, Chief Judge, held that: (1) the denial of the permit constituted a "taking" of plaintiff's property where the property could be put to no economically viable use without the permit, and the same was true despite plaintiff's residual rights in the property and residual market value, and (2) to avoid payment of compensation on the theory that the government was prohibiting pollution, the government was required to show that the plaintiff's rock mining activities would cause adverse physical effects on health, welfare or property of others.

Compensation adjudged due, with amount to be determined.

John A. DeVault, III, Jacksonville, Fla., with whom were C. Warren Tripp, Jr. and Bedell, Dittmar, DeVault, Pillans & Gentry, Jacksonville, Fla., for plaintiff.

Fred R. Disheroon, Washington, D.C., with whom were George B. Henderson and Asst. Atty. Gen. F. Henry Habicht, II, Washington, D.C., for defendant.

OPINION

KOZINSKI, Chief Judge.

This case presents the question of whether denial of a dredge and fill permit by the U.S. Army Corps of Engineers pursuant to section 404 of the Clean Water Act, 33 U.S.C. § 1344 (1982), constitutes a taking of plaintiff's property, where the property can be put to no viable economic use without such a permit.

Background

On September 21, 1972, plaintiff bought about two and a half square miles (1560 acres) of unimproved wetlands in Dade County, Florida, several miles inland from the city of Miami. Plaintiff's property is situated above a limestone formation that is approximately 50 feet deep. The limestone is suitable for mining and tests indicate that the property would yield some 100,000 tons of usable rock per acre.[1]

Plaintiff is in the business of manufacturing and selling crushed stone and aggregates for use in construction. It bought the property for the specific purpose of mining the limestone from which these materials are produced.

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[1] The court makes no finding as to the amount of limestone on the property or its value. These issues may be resolved through further proceedings in the damages portion of this case.

Plaintiff considered the property particularly well suited to its purposes because of the proximity to Miami and the fact that a spur of the Seaboard Coast Line Railroad servicing a nearby quarry could be extended to provide a convenient and economical means of transporting the limestone to other parts of the state.

Rock mining is common in the part of Dade County where plaintiff's property is located. The normal method of extracting limestone is by use of a dragline, a large mechanical device that looks somewhat like a crane. The dragline is placed near one corner of the property on a pad (an area covered with crushed rock or other filler to raise it above the water level). The peat layer covering the limestone is then removed from the area adjacent to the pad, exposing the rock. The rock is loosened through blasting and then scooped out by the dragline. After some processing, the rock is placed on trucks or box cars for shipping. When the dragline finishes removing all of the rock within its reach, it is moved to a new location. Blasting and excavation begins anew until the cycle is completed and the dragline must be moved again.

Excavation continues in cycles in a single direction leaving behind a trench some 50 feet deep and filled with water. When the dragline reaches the end of the excavation area, it reverses course and digging continues immediately adjacent to the trench just completed. With each sweep of the dragline, the trench becomes wider; it eventually develops into a deep body of standing water. This body of water is incapable of sustaining the rich variety of plant and animal life found in the displaced wetlands.

When plaintiff bought the property, it had all of the necessary state and local permits or waivers to operate a limestone quarry; there were no applicable federal statutes or regulations. Approximately one month later, Congress passed the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 *et seq.* (FWPCA). This legislation gave the Army Corps of Engineers jurisdiction to issue permits for discharging certain materials into the "waters of the United States." In 1977 the Corps issued regulations taking the position that this phrase extends the Corps' jurisdiction to wetlands.

The removal of limestone does not, per se, implicate the FWPCA or require a permit from the Corps. Nor is the destruction of the wildlife habitat associated with limestone removal, in and of itself, a basis for exercise of Corps jurisdiction over plaintiff's activities. The Corps' sole basis for jurisdiction is the fact that, as part of the mining process, plaintiff must temporarily deposit the excavated material onto wetlands immediately adjacent to the excavation. This occurs in two ways. First, some of the excavated material is used to construct the pad or platform on which the dragline sits. Second, after material is removed from the excavation pit, it is normally deposited on the ground for drying and processing before it can be shipped.

Because of a serious downturn in the southern Florida building industry in the mid-1970s, plaintiff did not begin mining until July of 1978. At that time, plaintiff was unaware of the Corps' jurisdiction or the need to obtain a federal permit. The Corps discovered plaintiff's activities and issued a cease and desist order on September 7, 1978.

Plaintiff complied and began preparing a permit application. As a condition for considering the application, the Corps required that plaintiff restore the property to its pre-excavation condition.

On October 1, 1979, plaintiff submitted to the Corps an application for a permit covering a 98 acre portion of the property. Plaintiff, in fact, intended to excavate all of its property. However, the Corps had advised prospective applicants that it would not consider applications that covered more than about three years of excavation. Plaintiff estimated that excavation of the property covered by its application would take about that long, while it might well take many decades to excavate the entire tract.

On October 2, 1980, the Corps denied plaintiff's permit application. Plaintiff did not seek judicial review of that decision. Instead, it brought suit in our predecessor court claiming that denial of the permit constituted a taking of its property because there are no economically viable uses (other than rock mining) to which the land may be put.

Key Findings of Fact

Trial on the question of liability was held in Florida from January 3 through January 11, 1984. After briefing and argument, the court made a number of oral findings of fact, the following of which are crucial to analysis of the issues presented:

(1) At the time the Corps issued its cease and desist order, plaintiff had all the necessary state permits or

waivers, as well as the economic resources, to mine limestone on its property. Limestone mining would have afforded plaintiff substantial economic gain.

(2) Under the current state of technology, it is impossible to profitably mine limestone on plaintiff's property without a Corps of Engineers dredge and fill permit. *See also* p. 165 n. 4 *infra*.

(3) Rock mining is the only viable economic use to which the property can be put. Some other uses (such as hunting and fishing) would not yield sufficient income to cover even real estate taxes. Because of its location, the property is not suitable for residential construction or commercial activity. In any case, construction connected with such alternative uses would require the issuance of a Corps permit. Such uses would alter the character of the land and surrounding environment much more drastically than limestone mining; it is unthinkable that the Corps would issue such a permit in light of its denial of plaintiff's application. *See also* p. 178 n. 23 *infra*.[2]

Discussion

Plaintiff claims a regulatory taking. Specifically, it argues that the United States has so seriously interfered with its right to use and enjoy its property as to render the property economically useless.

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[2] Additional findings of fact are set forth on the record of the May 7, and June 12, 1984, hearings and, where appropriate, in the body of this opinion.

The concept of a regulatory taking is not new in the law. More than half a century ago, the Supreme Court held that a state statute that effectively deprived the plaintiff of the right to mine its land constituted a taking compensable under the fifth amendment. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15, 43 S.Ct. 158, 159-60, 67 L.Ed. 322 (1922). Over the years, the Supreme Court, the Court of Claims and the Court of Appeals for the Federal Circuit have consistently upheld the principle that excessive regulation may constitute a taking. *Ruckelshaus v. Monsanto Co.*, ___ U.S. ___, ___, 104 S.Ct. 2862, 2874-75, 81 L.Ed.2d 815 (1984); *Kirby Forest Industries v. United States*, 467 U.S. 1, ___, 104 S.Ct. 2187, 2196, 81 L.Ed.2d 1 (1984); *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 295-96, 101 S.Ct. 2352, 2370-71, 69 L.Ed.2d 1 (1981); *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980); *Kaiser Aetnd* [sic] *v. United States*, 444 U.S. 164, 174-75, 100 S.Ct. 383, 389-90, 62 L.Ed.2d 332 (1979); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 138 n. 36, 98 S.Ct. 2646, 2666 n. 36, 57 L.Ed.2d 631 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594, 82 S.Ct. 987, 990, 8 L.Ed.2d 130 (1962); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168, 78 S.Ct. 1097, 1104, 2 L.Ed.2d 1228 (1958); *Skaw v. United States*, 740 F.2d 932, 939 (Fed.Cir.1984); *Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 887-88 (Fed.Cir.1983); *Benenson v. United States*, 548 F.2d 939, 949, 212 Ct.Cl. 375, 392 (1977); *Pete v. United States*, 531 F.2d 1018, 1034, 209 Ct.Cl. 270, 297

(1976); *see also Whitney Benefits, Inc. v. United States*, 752 F.2d 1554, 1557 (Fed.Cir.1985).[3]

The Supreme Court has enunciated the following test as to whether a regulatory taking has occurred: "A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land. . . . '" *Hodel*, 452 U.S. at 295-96, 101 S.Ct. at 2370-71 (quoting *Agins*, 447 U.S. at 260, 100 S.Ct. at 2141).

The court has found that denial of the permit by the Corps of Engineers made it impossible to profitably mine rock on plaintiff's property. To paraphrase Mr. Justice Holmes, "[w]hat makes the right to mine [rock] valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain [rock] has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Pennsylvania Coal*, 260 U.S. at 414, 43 S.Ct. at 160.[4] In addition, the court has found that there

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[3] In *Chicago, Rock Island & Pacific Ry. v. United States*, 284 U.S. 80, 52 S.Ct. 87, 76 L.Ed. 177 (1931), the Court noted that "[c]onfiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title." *Id.* at 96, 52 S.Ct. at 92, *quoted with approval in Kaiser Aetna*, 444 U.S. at 174 n. 8, 100 S.Ct. at 390 n. 8.

[4] Restriction of the right to extract minerals in a particular manner may not work a taking if there are alternative methods to profitably mine the property. *See Whitney Benefits, Inc. v. United States*, 752 F.2d at 1562 (Markey, C.J., dissenting). Here, defendant has admitted that it is aware of no method for removing the limestone from plaintiff's property without obtaining a Corps permit to fill wetlands. Hearing Transcript of Aug. 25, 1983, at 15-16. Edward L. Baker, President of Florida Rock, testified that there is no economically viable method of mining limestone that can be accomplished without some filling of the property. Trial Transcript of Jan. 3, 1984, at 127. The court is

are no other economically viable uses to which the property can be put. Denial of the permit therefore has deprived plaintiff of all economically viable use of its land. Applying the standard enunciated by the Supreme Court in *Hodel* and other cases leads to the conclusion that there has been a regulatory taking and that plaintiff is entitled to compensation.

Defendant has launched a volley of arguments as to why plaintiff should nevertheless be denied any recovery. Many of these argument are ingenious and forcefully presented. If sustained, however, they would tie a claim for regulatory taking into a Gordian knot no plaintiff could ever hope to unravel. In considering defendant's arguments, therefore, the court is mindful of the Supreme Court's admonition that takings cases must not be resolved by mechanical application of formulae but through reason in light of common sense and experience. *Kaiser Aetna v. United States*, 444 U.S. at 175, 100 S.Ct. at 390;[5] *see also Monsanto*, ___ U.S. at ___, 104 S.Ct. at 2874;

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persuaded by Mr. Baker's testimony and finds that there is no profitable method of extracting limestone from plaintiff's property that would not require a Corps permit.

[5] The following passage from *Kaiser Aetna* exemplifies the Court's unwillingness to be lured toward an absurd result by an elegant argument:

> There is no denying that the strict logic of the more recent cases limiting the Government's liability to pay damages for riparian access, if carried to its ultimate conclusion, might completely swallow up any private claim for "just compensation" under the Fifth Amendment. . . . But, as Mr. Justice Holmes observed in a very different context, the life of the law has not been logic, it has been experience.

444 U.S. at 177, 100 S.Ct. at 391.

Goldblatt, 369 U.S. at 594, 82 S.Ct. at 990; *Penn Central Transportation Co.*, 438 U.S. at 124, 98 S.Ct. at 2659; *Whitney Benefits, Inc.*, 752 F.2d at 1558; *Althaus v. United States*, 7 Cl.Ct. 688, 694 (1985).

1. *Plaintiff's Residual Rights in the Property*

Defendant first argues that plaintiff has not been deprived of its property because it retains valuable incidents of ownership: the right to use the land in its current condition; to restrict or permit access to it by others; to sell, lease or give it away, in whole or in part. According to defendant, plaintiff has been deprived of merely one in the "bundle of sticks" comprising its rights in the property, and such a partial deprivation does not constitute a taking. Defendant relies on such cases as *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980); *Andrus v. Allard*, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979); *Deltona Corp. v. United States*, 657 F.2d 1184, 228 Ct.Cl. 476 (1981); and *Jentgen v. United States*, 657 F.2d 1210, 228 Ct.Cl. 527 (1981).

Defendant's argument proves far too much. A taking through regulation invariably leaves the property owner certain incidents of ownership that, on their face, appear to be significant. For example, in *Pennsylvania Coal* the property owner was denied the right to mine coal where doing so would cause the subsidence of any dwelling. The owner retained numerous other rights: to sell, lease or give away its interest in the property; to visit the mine; to exclude all intruders and trespassers. Similarly, in *Benenson*, where plaintiffs were deprived of the right to replace the Willard Hotel with a modern office building,

or to make any other significant exterior structural changes, the court noted that "plaintiffs have complete freedom to alter the interior of the building for uses other than a hotel, and [defendant] has not prohibited the sale or other use of the property." 548 F.2d at 948, 212 Ct.Cl. at 390. In *Pete*, barge owners were prohibited from conducting commercial operations on Basswood Lake, Minnesota. Plaintiff nevertheless retained the right to exclude others from using or occupying the barges; to sell or lease them; to modify, disassemble, or destroy them; and to move them to another location. In each of these cases, the court recognized that such rights as remained to the property owner, important though they may have seemed in theory, retained little or no economic value as a result of the government's action. *See also Amen v. City of Dearborn*, 718 F.2d 789 (6th Cir.1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1596, 80 L.Ed.2d 127 (1984) (taking found even though landowners still had the right to live in their houses).

In cases involving regulatory takings, the court must examine the substance, rather than the legal trappings, of what is left as a result of the government's regulatory action. If that which is left to the property owner is rendered meaningless by that which is taken, compensation is due.

Here, the court has found that denial of the Corps permit deprived plaintiff of the only economically viable use of its property – rock mining.[6] Under such circumstances, plaintiff's remaining ownership rights, such as

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[6] Defendant has suggested that plaintiff's holding the land for "long term investment," in the hope that it will eventually become available for productive use, is itself a viable economic activity. Of course, the same could have been said of the owners

the right to exclude others from the property, are meaningless; plaintiff has no reason to exclude others if it cannot itself put the property to productive use. Under such circumstances, plaintiff's residual rights are hollow and cannot defeat its claim for just compensation.

2. *Residual Market Value*

Defendant next argues that plaintiff cannot claim a taking of its property because its land has not been rendered entirely worthless. Defendant presented evidence that there is a market for plaintiff's land and relies upon cases holding that a mere diminution in the value of property is not a taking. *Agins*, 447 U.S. at 262-63, 100 S.Ct. at 2142-43; *Andrus*, 444 U.S. at 66, 100 S.Ct. at 327; *Penn Central Transportation Co.*, 438 U.S. at 131, 98 S.Ct. at

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of the mine in *Pennsylvania Coal*, of the Willard Hotel in *Benenson* and of the unimproved land in *Althaus*. If passively holding land against the possibility that restrictions on its use will be lifted were deemed a productive economic use, property would never be rendered useless by regulation and there could be no such thing as a regulatory taking.

There may be situations where regulatory restrictions have no practical effect because the prohibited use is not economically feasible. This is not such a case. Here, plaintiff had begun to mine the property and abandoned its activities only when served with a cease and desist order by the Corps of Engineers. Plaintiff then applied for a dredge and fill permit, disclosing every intention of conducting mining activities. Under these circumstances, relegating plaintiff to passively holding the land in the hope that the regulatory climate may someday change cannot be deemed the type of viable economic use that will defeat a claim for a taking under the fifth amendment.

2663; *Deltona Corp.*, 657 F.2d at 1193-94; 228 Ct.Cl. at 491-92; *Jentgen*, 657 F.2d at 1213, 228 Ct.Cl. at 532.

In the cases cited by defendant the property affected by the government's action continued to have significant value not merely because it could be sold for some positive price in the market, but in the more meaningful sense that it continued to be available for productive economic activity. For example, the zoning ordinance in *Agins* drastically reduced the number of dwellings that could be built on plaintiff's land. However, a significant amount of construction was in fact permitted; this constituted a profitable economic use. In *Penn Central* the Court noted that "[t]he restrictions imposed . . . not only permit[ted] reasonable beneficial use of the landmark site but also afford[ed] appellants opportunities further to enhance not only the Terminal site proper but also other properties." 438 U.S. at 138, 98 S.Ct. at 2666 (footnote omitted). In contrast, plaintiff here is left without *any* economically viable use of its property and is afforded no "transfer rights" or other accommodation of its interest.

Common sense suggests that regulatory action will never entirely eliminate the market value of the real property it affects. Land, by its nature, is timeless; government policy, indeed any particular government entity, is inherently transitory. There are invariably speculators willing to gamble that even the most severe restrictions will eventually be lifted or modified so as to render the property usable again. If the existence of such a residual market for the property could defeat a claim for a regulatory taking, no regulatory taking could ever be proved and the concept would be rendered meaningless. In fact, when courts have determined that property has been

rendered unfit for economically viable activity, they have found a fifth amendment taking even though the property obviously continued to have market value. *See, e.g., Kaiser Aetna v. United States,* 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922); *Benenson v. United States,* 548 F.2d 939, 212 Ct.Cl. 375 (1977); *Pete v. United States,* 531 F.2d 1018, 209 Ct.Cl. 270 (1976); *Amen v. City of Dearborn,* 718 F.2d 789 (6th Cir.1983), *cert. denied,* ___ U.S. ___, 104 S.Ct. 1596, 80 L.Ed.2d 127 (1984); *Annicelli v. Town of South Kingstown,* ___ R.I. ___, 463 A.2d 133 (1983); *Bartlett v. Zoning Commission,* 161 Conn. 24, 282 A.2d 907 (1971); *Dooley v. Zoning Commission,* 151 Conn. 304, 197 A.2d 770 (1964); *State v. Johnson,* 265 A.2d 711 (Me.1970); *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills,* 40 N.J. 539, 193 A.2d 232 (1963).

Here, the court finds that the market for plaintiff's land is based on speculation, much of it fueled by unscrupulous promoters. Southern Florida real estate attracts much investment capital, particularly from abroad. Land is sold to unwary, distant buyers on the premise that it is, or can be rendered, suitable for development. The State of Florida has recognized this as a serious problem and has taken measures to curb the practice, apparently without complete success. The existence of a market for plaintiff's property, despite what the court has found to be its uselessness for all productive activity, is based upon speculators' expectations that they will be able to pass the property on to hapless investors who do not understand the nature and scope of the restrictions on its use, or can

be persuaded that the restrictions are transitory or can be circumvented.[7]

It is well established that speculative value may not be taken into account for purposes of determining compensation in condemnation proceedings. *United States v. 117,763.00 Acres of Land,* 410 F.Supp. 628, 631-32 (S.D.Cal.), *aff'd sub nom. United States v. Shewfelt Investment Co.,* 570 F.2d 290 (9th Cir.1977); *accord Olson v. United States,* 292 U.S. 246, 257, 54 S.Ct. 704, 709, 78 L.Ed. 1236 (1934); *United States v. 158.24 Acres of Land,* 696 F.2d 559, 562 (8th Cir.1982); *United States v. 620.00 Acres of Land,* 101 F.Supp. 686, 690 (W.D.Ark.1952). In *117,763.00 Acres of Land,* the government sought to condemn a leasehold of desert property for use as an artillery range. The property owners argued that the fair market value ought to be determined by reference to prices paid by speculators for nearby property. At the urging of the United States, the court rejected this argument noting that the prices paid by speculators did not rest upon the "appraisal of the land in terms of its uses and a forecast of what the needs of a growing and shifting population for those uses will be," but upon the fact that "each speculator buys with the thought that he can sell to another speculator at a higher

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[7] Potential buyers would require much sophistication to understand the full scope of the restrictions of the use of plaintiff's land. The FWPCA does not directly prohibit construction in wetlands, but merely requires a permit therefor. Buyers might well believe that a permit is readily obtainable. In reality, if a permit was denied plaintiff for rock mining, there is little possibility that a permit would be issued for other construction activities (such as apartment houses) which alter the character of the land and surrounding environment much more drastically.

price . . . the whole thing [being] a game of wits with someone at the end of the trading chain losing." 410 F.Supp. at 632.

It seems eminently sensible, as well as entirely fair, to apply the same rule in inverse condemnation cases. This court has done so recently in *Althaus v. United States*, 7 Cl.Ct. 688 (1985). The author of this opinion cannot improve on Judge Mayer's terse dismissal of defendant's identical argument in *Althaus*: "[T]he court rejects the idea that the fifth amendment can be avoided by forcing citizens to sell their property to speculators at a fraction of its value." *Id.* at 695.

3. *Rock Mining as an Element of Value*

Perhaps defendant's most ingenious argument is that the court must ignore limestone mining – indeed any activity requiring a federal permit – in determining whether plaintiff has been deprived of all viable economic use of its property. Under defendant's theory, any use that is subject to governmental approval is dependent upon the consent of the government for its value and so defendant may not be charged with loss arising from the prohibition. Defendant relies upon a series of direct condemnation cases holding that the United States need not compensate a property owner for value derived from uses that the government was entitled to prevent through a power other than eminent domain. *United States v. Fuller*, 409 U.S. 488, 93 S.Ct. 801, 35 L.Ed.2d 16 (1973); *United States v. Rands*, 389 U.S. 121, 88 S.Ct. 265, 19 L.Ed.2d 329 (1967); *United States v. Twin City Power Co.*, 350 U.S. 222, 76 S.Ct. 259, 100 L.Ed. 240 (1956); *United*

States v. Cors, 337 U.S. 325, 69 S.Ct. 1086, 93 L.Ed. 1392 (1949).

Defendant's argument badly distorts the nature and function of government in a free society where the right to own and enjoy property is a fundamental aspect of personal liberty, not a privilege dependent upon the whim of the sovereign. *See Lynch v. Household Finance Corp.*, 405 U.S. 538, 552, 92 S.Ct. 1113, 1122, 31 L.Ed.2d 424 (1972);[8] *see also Fuentes v. Shevin*, 407 U.S. 67, 81, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556 (1972); *Shelley v. Kraemer*, 334 U.S. 1, 10, 68 S.Ct. 836, 840, 92 L.Ed. 1161 (1948). Under defendant's theory, the government would never be required to pay compensation for denial of a permit or, indeed, for any regulatory activity that severely limits or entirely destroys the economic uses to which property may be put. Since practically all economic activity has now been held to be the proper subject of regulation by the federal government, defendant's argument would effectively free the United States of all constitutional constraints in the area of economic regulation. This the court will not do. As Professor Epstein recently noted: "Our guiding principle should derive from our Lockean tradition – a tradition that speaks about justice and natural rights. . . . When government wishes to encroach on those rights in order to discharge its collective functions, it must give all the individuals on whom it imposes its

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[8] In *Lynch* the Court noted that "the dichotomy between personal liberties and property rights is a false one. . . . Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." 405 U.S. at 552, 92 S.Ct. at 1122.

obligations a fair equivalent in exchange." Epstein, *Judicial Review: Reckoning on Two Kinds of Error,* 4 Cato J. 711, 716 (1985).

The cases defendant cites do not, in fact, support its conclusion. In *Fuller,* the property owner sought compensation for value derived from permits entitling him to graze his cattle on federal lands adjacent to the condemned land. The Court held that this element of value was not compensable because the Secretary of the Interior was authorized to withdraw the permits at will, thereby destroying the value created by their existence. 409 U.S. at 493, 93 S.Ct. at 805. In *Rands* and *Twin City Power Co.,* the Court denied compensation for losses resulting from an exercise of the "navigational servitude" of the United States. *Rands,* 389 U.S. at 126, 88 S.Ct. at 268; *Twin City Power Co.,* 350 U.S. at 228, 76 S.Ct. at 263. In each of these cases, the action of the United States was taken in its proprietary, rather than its sovereign, capacity. The rights in question belonged to the United States and were only enjoyed by the property owners subject to revocation.[9] In our case, the right to mine the property belongs entirely to plaintiff. The United States has no proprietary interest in plaintiff's land and therefore no right to prohibit rock mining except through exercise of its regulatory power. This is plainly not the situation contemplated in *Fuller,*

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[9] *Cors* has no relation to this case. It stands for the proposition that the government need not compensate the owner for value created by the very use to which the government plans to put the condemned property. 337 U.S. at 333, 69 S.Ct. at 1091. Here, the value destroyed by denial of the permit was not created by the government; it is due entirely to market forces extraneous to the Corps' permitting process.

Rands and *Twin City Power Co.*, and the United States therefore cannot escape its responsibility to pay compensation under the fifth amendment.[10]

4. *Taking and the Police Power*

Defendant also raises arguments to the effect that the Corps' denial of a permit cannot constitute a taking because it merely prohibits an activity "found by Congress to be detrimental to the public welfare;" because plaintiff's proposed rock mining operation would cause pollution; and because defendant is trying to protect "valuable habitat and food chain resources[,] . . . values

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[10] Defendant might have been misled by language in cases such as *Fuller* to the effect that "the Government as condemnor may not be required to compensate a condemnee for elements of value that the Government . . . might have destroyed under the exercise of governmental authority *other than the power of eminent domain*." 409 U.S. at 492, 93 S.Ct. at 804 (emphasis added). This language does not, in fact, support defendant's position. Destruction of some property rights may occur incident to a valid exercise of regulatory authority, but where the destruction is excessive – as in this case – it is deemed to have been an exercise of the power of eminent domain as well. *See San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 653, 101 S.Ct. 1287, 1304, 67 L.Ed.2d 551 (1981) (Brennan, J., dissenting) & authorities cited therein; *Sun Oil Co. v. United States*, 572 F.2d 786, 818, 215 Ct.Cl. 716, 769 (1978) ("if [government] regulation is unreasonable or arbitrary relative to private property rights, the law of eminent domain applies") (citing *Goldblatt*, 369 U.S. at 594, 82 S.Ct. at 990, and *Pennsylvania Coal*, 260 U.S. at 413-14, 43 S.Ct. at 159-60); *Althaus v. United States*, 7 Cl.Ct. 688, 693 (1985) (government actions resulted in de facto exercise of power of eminent domain). Even by its own terms, then, the statement quoted from *Fuller* has no application to this case.

that society has historically enjoyed and may properly protect." These arguments are considered in turn.

a. *Activity Detrimental to the Public Welfare*

Defendant's broadest argument is that compensation need never be paid where an activity is prohibited that has been "found by Congress to be detrimental to the public welfare." The court rejects this argument out of hand. Exercise of the police power, by definition, promotes the public good. It follows that any use prohibited under the police power is contrary to the public welfare. In essence, then, defendant is arguing that an exercise of the police power can never result in a taking, regardless of how innocuous the private activity or how severely the governmental action diminishes the use and enjoyment of private property. The compensation clause of the fifth amendment would be read out of existence if government could define away private property rights by pronouncing their exercise as contrary to the public welfare.

The Supreme Court may have suggested the position urged by defendant a century ago in *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887). *Mugler* established the "noxious use" doctrine, the principle that a valid exercise of the police power that merely protects the "health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." *Id.* at 668-69, 8 S.Ct. at 300-01. At issue in *Mugler* was an amendment to the Kansas constitution and implementing legislation that prohibited the manufacture and sale of intoxicating liquors. Defendants, owners of breweries in operation

prior to the passage of the amendment, claimed that they had been deprived of a property interest by the state without just compensation in violation of the fourteenth amendment. The Court concluded that "[t]he exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner." *Id.* at 669, 8 S.Ct. at 301.

The law has progressed significantly since *Mugler.* In *Pennsylvania Coal* the Court repudiated the proposition that an exercise of the police power can never constitute a taking, making what is perhaps the strongest statement yet to the contrary:

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

260 U.S. at 415, 43 S.Ct. at 160.

Cases since *Pennsylvania Coal* have consistently rejected the *Mugler* analysis. In *Goldblatt*, plaintiff argued that a civic ordinance preventing it from mining gravel and sand on its land, as it had in the past, was a taking in violation of the fifth amendment. The Court concluded that there had been no taking as the ordinance was a valid exercise of the police power. *Mugler* was quoted, but the Court specifically disowned the concept that "governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation." 369 U.S. at 594, 82 S.Ct. at 990; *see Barbian v. Panagis*, 694 F.2d 476, 485 n. 7 (7th Cir.1982) ("[t]hough the Supreme Court has held in [*Mugler*] that an exercise of the police power may never amount to a taking, the Court has retreated from that principle in more recent decisions") (citing *San Diego Gas & Electric Co.*, *Agins*, and *Pennsylvania Coal*). As this court recently recognized, "[w]hen the police power ventured into such areas as zoning and conservation . . . this polestar [the *Mugler* analysis] disappeared over the horizon." *Morton Thiokol, Inc. v. United States*, 4 Cl.Ct. 625, 630 (1984).[11]

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[11] Speaking for an apparent majority of the Court, Mr. Justice Brennan noted as follows in *San Diego Gas & Electric Co.*:

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive

Mugler has also come under scholarly attack. In 1964 Professor Sax noted that "[t]he noxious use, cause-of-the-harm test is simply insufficient for the task" of determining when compensation must be paid under the fifth amendment. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 50 (1964). Professor Michelman notes that while "the notion that all property is held subject to an implied police-power servitude seems at one time to have been entertained by the Supreme Court [in *Mugler*]," this theory met its Waterloo in *Pennsylvania Coal*. Michelman, *Property as a Constitutional Right*, 38 Wash. & Lee L.Rev. 1097, 1108 (1981); *see also Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv.L.Rev. 1165, 1199 n. 72 (1967) ("the accuracy, and the ingenuousness, of the Court's gratuitous word judgment [in *Mugler*] were probably questionable then, and surely have been ridiculed by history").

In short, *Mugler* was one narrow[12] attempt by the Supreme Court to deal with the problem of competing

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> him of all beneficial use of it. From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property.

450 U.S. at 652, 101 S.Ct. at 1304 (footnote omitted), *quoted in Jentgen*, 657 F.2d at 1212, 228 Ct.Cl. at 531.

[12] In *Berkowitz v. United States*, 340 F.2d 168 (1st Cir.1965), the court distinguished *Mugler*, noting that, "[t]he medicines which courts administer when liquor is involved have their own peculiar emotional or, conceivably, rational elements, and are not suitable prescriptions for the generality of cases." *Id.* at 172.

uses of land in an industrialized society. Developments over the past century have significantly weakened its precedential value. It is no longer a correct statement of the law as to the general relationship between the police power and the takings clause of the fifth amendment.

b. *Prohibition of Pollution*

Defendant suggests that *Mugler* continues to have force in the circumstances of this case because the proposed use of the property would cause pollution. Defendant argues that there is no right to use one's property so as to harm others and government may therefore prohibit such uses without paying compensation.

It is conceivable that government could prohibit all viable economic uses of property without paying compensation if all such uses, in fact, cause pollution. However, simple invocation of the term pollution cannot foreclose a plaintiff's right to compensation under the fifth amendment. "[M]ere labels" of this sort afford "no talismanic immunity from constitutional limitations." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964). Government may not circumvent the takings clause by defining an activity as pollution and rendering it noxious by fiat. Pollution, as that term is normally understood, involves serious adverse physical effects upon the health, welfare or property of others. To avoid the payment of compensation on this theory, the government must show that the prohibited activity in fact causes such harm.

i. Defendant first argues that plaintiff's activity constitutes pollution because it is defined as such by statute. In the FWPCA, Congress defined as pollution the dumping of "dredged and fill" material into the nation's waters. After rock is scooped out of the excavation pit during the mining process, it is placed on the adjacent wetlands. This rock falls under the definition of "dredged and fill" material and its deposit on wetlands therefore constitutes pollution under the Act's definition. The evidence presented at trial, however, establishes that placing rock into the water after it has just been scooped up has no material effect upon the health, welfare or property of others. Under these circumstances, the statutory definition of pollution does not advance the analysis or automatically insulate the government's action from the takings clause of the fifth amendment.

ii. Defendant next argues that plaintiff's proposed mining operation constitutes pollution because it would cause contamination of the water supply. To understand this argument one must turn to certain facts disclosed at trial. The limestone that plaintiff intends to mine is part of the Biscayne Aquifer, a vast deposit of porous rock underlying southern Florida. The aquifer has the capacity to store large quantities of fresh water within its pores. Huge wellfields are dug into the aquifer from which water is extracted for human consumption. One such wellfield, known as the Northwest wellfield, is located approximately four miles northeast of plaintiff's property. Water extraction depletes the aquifer, as does the flow of water out of the aquifer toward the Atlantic Ocean. The aquifer is replenished by rainfall and through a network of canals that flow south from Lake Okeechobee in south

central Florida. The canals, many of which run along public highways, are cut deep into the limestone so that the water they carry can be absorbed.

Defendant's principal contention is that the peat or muck layer in the marsh filters out various chemicals (such as phosphorus), heavy metals (such as zinc and iron) and pesticides (such as DDT) that otherwise would enter the water from the atmosphere. The peat is situated immediately above the limestone rock at the bottom of the marsh; it is generally covered by about a foot of water and is inhabited by plant and animal life.

At trial, defendant sought to establish that removal of the peat layer through rock mining would expose the aquifer to contamination. Defendant's evidence on this point was not persuasive, however, and the court finds that the peat layer does not, in fact, serve as a filter for contaminants. The most striking shortcoming of the evidence defendant presented concerning the function of the peat layer was the absence of direct empirical data. The most obvious – and effective – way to test whether the peat layer acts as a filter would have been to analyze the water above and below it. If the peat acts as a filter, the water in the aquifer below would contain fewer contaminants than the water in the marsh above. Defendant's expert admitted that such an analysis would have been effective in measuring the filtering capacity of the peat layer but gave no reason for rejecting this methodology. Nor did the expert report that he had performed any laboratory experiments to test the filtering qualities of the peat.

Instead of relying on such obvious, simple and apparently foolproof techniques, defendant's expert based his opinion entirely on the fact that certain contaminant substances were found in greater concentrations in the peat layer than in the water immediately above it. This fact does not, however, establish that the peat is currently acting as a filter. In the first place, the witness did not explain why filtration would be the only explanation for the observed higher concentrations of chemicals in the peat layer. The court cannot ignore the possibility that this higher level of contaminants in the peat may be the result of chemical or biological processes other than filtration.

More significantly, the witness admitted that even if the peat possessed filtering properties, it could not continue to act as a filter for any length of time unless there were some cleansing mechanism that removed the contaminants from the peat on a periodic basis.[13] Defendant's witness admitted that the alleged filtering action had been in process for many millenia, easily enough time to saturate the peat layer. Despite intense questioning on this point, however, the witness was unable to give a satisfactory explanation of how the peat might be purified periodically.[14] Absent such a purification mechanism, the peat

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[13] This is so because filters become saturated with the substances they absorb and lose their effectiveness. The need to periodically clean or change filters in swimming pools, fish tanks and air conditioning systems are illustrations of this principle.

[14] The witness suggested that animals might feed on vegetation growing on the property (ingesting some of these chemicals) then leave the property and die elsewhere. However, as the

would, indeed, show high concentrations of contaminants as observed by defendant's expert, but would have reached saturation and be useless in filtering out further contaminants. On this record, then, the court must reject defendant's assertion that the peat acts as a filter and that its removal during rock mining would eliminate important natural protections against atmospheric contamination of the water supply.

Defendant's expert also suggested that rock mining adversely affects water quality in another way. As described earlier, after the rock has been excavated, there remains a large, water-filled pool where the limestone has been removed. The pool is generally over 50 feet deep and can support little or no aquatic life. Sunlight can penetrate only about 20 feet beneath the surface of the pool. Without light, there is no photosynthesis; without photosynthesis, no oxygen is produced. This means that the bottom 30 feet of the pool are anaerobic and much colder than the water nearer the surface. The expert also testified that the differences in water temperature lead to stratification, which means that the water near the surface will not readily mix with the water below. Under those conditions, certain heavy metals are observed in

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witness recognized, this process also works in reverse, with animals feeding elsewhere and coming to die on the property, thereby depositing whatever chemicals are trapped in their bodies. The same is true of other transport mechanisms suggested by the witness: peat fires that would cause the chemicals to become airborne and fall to the ground elsewhere; detritis that would flow onto the property as quickly as it passed out; and aquatic insect larvae that mature in one location within the peat and die elsewhere.

much higher concentrations near the bottom of the pool than in the warmer, oxygenated water near the surface.[15] The witness concluded that rock mining harms water quality by creating deep water pools that cause the release of metals into the water.

The witness' testimony on this issue overlooks a number of obvious considerations. In the first place, there is no reason to assume that the anaerobic, low-temperature conditions that prevail 50 feet below the surface in open water rock pits do not also exist at the same depth within the aquifer. Indeed, while sunlight penetrates to 20 feet below the surface of a lake, it presumably does not penetrate through the peat layer at all and certainly does not pass into the rock. It seems to follow that the water within the aquifer is subject to greater anaerobic conditions and cooler temperatures than the water in a rock pit. Moreover, the peat layer and the aquifer itself would totally prevent mixing of the surface water with the water within the aquifer. This could lead to greater temperature stratification than in a rock pit where warm, oxygenated surface water may mix at least to a limited extent with the water below.

It is conceivable that something about the chemical or physical composition of the aquifer nullifies the forces

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[15] Defendant's expert was somewhat laconic in explaining what causes these metals to appear. As best the court can gather from the testimony, these metals are also present in warmer, oxygenated water although they may be combined with organic compounds. The absence of organic materials, together with the colder temperatures near the bottom of the pool, apparently causes these metals to be released or precipitated so that they can be separately observed and measured.

that are at work within the rock pit. However, nothing in the testimony of the witness suggested that to be the case. Indeed, the witness limited his analysis to a totally irrelevant comparison between the conditions at the bottom of the rock pit, dozens of feet underwater, with those in the marsh, only a few inches below the surface. Surprisingly, the witness took no water samples from within the aquifer and made no comparison between heavy metal concentrations in the rock pit and in the aquifer at equivalent depths.

There is yet another problem with the expert witness' analysis. The data he presented consisted of one set of readings taken at an unidentified location within a rock pit. Even overlooking the patent unsuitability of a single sampling for any serious scientific inquiry, the reported measurement did not take into account the dynamic nature of the water within the rock pit. Defendant's own experts testified that, as the wellfields operate, the surrounding water table is lowered, causing water within the aquifer to flow towards the pumping stations. Moreover, fresh water within the aquifer naturally flows toward the ocean. At any point within the aquifer, therefore, there would be a measurable horizontal water flow in one or more directions. Depending upon the speed with which the water flowed, and the location of the measurement site, the water samples taken might or might not have reflected the chemical and physical conditions within the pool itself. For example, if the samples were taken near the upstream edge of the pool, the water retrieved could well have been recently released from the aquifer. Only by repeated, consistent readings at various locations could the witness have been reasonably sure

that the samples taken were of water that had been in the pool long enough to reflect the physical and chemical conditions there.

Finally, even if one were to conclude that the water in the rock pit is different in chemical composition from that elsewhere within the aquifer, defendant's expert failed to explain how this has a detrimental effect upon the quality of the drinking water. It must be remembered that, in this portion of its case, defendant was not suggesting that the rock pit admits greater quantities of heavy metals into the water supply. *But see* pp. 172 - 173 *supra*. The point of the expert's analysis was that heavy metals (which presumably already exist within the water) are precipitated or released as separate, identifiable compounds. *See* p. 173 & n. 15 *supra*. The witness failed to explain, however, why heavy metals in suspension are any more unsafe for human consumption than the same heavy metals in solution or combined with organic compounds.[16]

Defendant's final argument that rock mining causes contamination is based upon the proposition that rock pits make it easier for people to contaminate the water

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[16] It is worth noting that the "scientific"evidence presented was based on observations and measurements taken shortly before trial. It was not available to, and therefore was not considered by, the Corps in rendering its decision whether to issue the permit. The administrative record prepared by the Corps reveals no evidence of this sort. While the decisional document, issued October 2, 1980, notes that the peat layer serves a filtration function, the basis for this conclusion is not given. There is no discussion at all of the alleged higher concentrations of heavy metals within open rock pits.

supply by facilitating access to the water within the aquifer. There are a number of difficulties with defendant's argument on this point as well. First, the evidence at trial establishes that rock pits do not in fact increase the likelihood of contamination from toxic pollutants or other waste materials. If such substances are dumped anywhere on the wetlands covering the aquifer, they will seep through the peat layer and permeate the rock. This process might well be slower than if the contaminants were dumped in a rock pit but, according to undisputed testimony, they would eventually reach the aquifer in any event.

Second, there are already many places where the peat layer has been removed to allow direct access to the aquifer from the surface. The most notable of these are the canals used to transport water from Lake Okeechobee. The canals, many of which run along roads and highways, are cut deep into the aquifer so the flowing water can come into direct contact with the permeable rock. There is such a canal across the highway from plaintiff's property, readily accessible to the public. By contrast, rock quarries are fenced and closely guarded. It is preposterous to suggest that someone inclined to dump contaminants would eschew the easy access and seclusion of miles of canals and thousands of acres of wetlands, and sneak into a quarry to drop them into a rock pit.

If there is a legitimate concern that contaminants might be dumped into the aquifer through a rock pit, there are methods of preventing that harm that are far less draconian than a total prohibition of rock mining on plaintiff's property. For example, issuance of the permit could well have been conditioned on providing adequate

security and fencing around the pit, or on limiting future development of the property to avoid public access.

iii. Aside from the weakness of defendant's case, its position is further undermined by other evidence that strongly suggests rock mining has no negative effect on water quality. Most impressive is the fact that the area in the vicinity of plaintiff's property is littered with rock quarries, most of them much closer to the wellfields than plaintiff's property. These quarries have been in existence for many, many years, some predating the wellfields. Yet the local authorities do not hesitate to operate the wellfields, and, indeed, established them in that area despite the pervasiveness of rock mining. Furthermore, a study conducted regarding the effect of rock mining on water quality concluded that rock mining did not have an adverse impact on water quality. Even the Corps' own environmental assessment found "no definitive pattern of ground-water quality degradation or significant change in water quality" of wells in proximity to rock pits. U.S. Army Corps of Engineers, *Excavation and Use of Limestone in South Florida-Technical Report and Environmental Investigation*, § 1.5.6, at 1-65 (Jul. 21, 1982).[17]

Finally, plaintiff's proposed rock quarry was situated so that it would be highly unlikely that the quality of the water drawn from the wellfields would be affected. A

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[17] At the same time, the assessment concludes that rock mines result in an increase in water *quantity* available for consumption. *Excavation and Use of Limestone in South Florida*, § 1.5.6, at 1-61. This is because a pool can hold more water than can a portion of the aquifer of equal volume where much of the space is taken up by the rock itself.

Dade County ordinance protects the portion of the Biscayne Aquifer from which the wellfields draw their water. The ordinance is premised on a study showing the rate at which water will travel towards the wellfields in response to pumping. The study marks an outside "cone of influence," representing the farthest point in the aquifer from which water reaches the wellfields. Permits are required for development within the cone of influence. A number of rock quarries are within that cone of influence, some quite close to the wellfields. Plaintiff's proposed rock mine would have fallen entirely outside that cone of influence. Thus, water from its rock pit would never, for all practical purposes, have reached the wellfields.

On the basis of the evidence presented, the court finds that plaintiff's proposed rock mine would not have resulted in pollution of the water supply.

c. *Destruction of "Habitat & Food Chain Resources"*

Defendant raises a separate argument that the proposed project would eliminate a substantial amount of wetlands and with them "valuable habitat and food chain resources." The evidence in fact suggests that the rock pit would seriously and permanently disrupt the wetlands on plaintiff's property. Life forms in the marsh, such as fish and amphibians on which birds feed, would diminish. Moreover, the life cycle in the marsh produces detritis, miniscule particles of organic matter that result from the decay of plant and animal remains. Surface water flow moves detritis off the property, presumably to

serve as nutrients elsewhere.[18] In addition, the court notes that the swamp is a place of great natural beauty, teeming with an astonishing variety of life forms. By contrast, rock pits are unsightly and barren.

Defendant argues that denial of the permit cannot constitute a taking because the public was entitled to continued enjoyment of the environmental and aesthetic values the property now generates. In defendant's view, since plaintiff had no right to deprive the public of these values by disturbing the wetland environment, it is not entitled to compensation for being prohibited from doing so.

i. Defendant's argument stands our traditional concepts of private property rights on their head. It is impossible to use one's property in a society without having some impact, positive or adverse, on others. Nevertheless, the concept of property rights presupposes that private parties have wide latitude as to how they will use what they own. This principle has its limits, of course. For example, government may prohibit uses that cause the release of substances harmful to others, such as air or water pollution. *United States v. Ashland Oil & Transportation Co.*, 504 F.2d 1317, 1328-29 (6th Cir.1974). It may also restrict property uses to promote the general welfare, so long as the owner is left with some viable economic use.

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[18] Defendant proffered evidence that the flow of detritis from plaintiff's property makes its way to the Biscayne estuary some 12 miles away. The court excluded this evidence on the basis of surprise. In light of the court's substantive ruling, admission of this evidence would not have affected the outcome of the case in any event.

Agins, 447 U.S. at 260, 100 S.Ct. at 2141; *Penn Central Transportation Co.*, 438 U.S. at 138 n. 36, 98 S.Ct. at 2666 n. 36; *Goldblatt*, 369 U.S. at 594, 82 S.Ct. at 990; *Deltona Corp.*, 657 F.2d at 1192, 228 Ct.Cl. at 490; *Jentgen*, 657 F.2d at 1213-14, 228 Ct.Cl. at 533-34; *Althaus*, 7 Cl.Ct. at 698. But to accept defendant's argument that government may gratuitously freeze all development because the public has a vested right to continued enjoyment of the environmental, aesthetic or similar values generated by the property in its current state, would render the concept of private property meaningless.[19] *Cf. Pennsylvania Coal Co.*, 260 U.S. at 415, 43 S.Ct. at 160 (unlimited approval by the courts of restrictions on the use of property may cause private property to disappear).

Federal and state courts alike have been vigilant in protecting private parties from governmental action that forces them to maintain their property in an undeveloped condition. *Althaus* provides an excellent illustration. There, a series of plaintiffs claimed that the government had restricted use and development of their property. As to some plaintiffs (those whose land was already developed), the court ruled that there was no taking because the owners continued to have reasonable use of their property. *Althaus*, 7 Cl. Ct. at 698. However, as to those owners who were forced to maintain their property in an

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[19] Defendant's argument was implicitly rejected by the Court of Claims in *Benenson*, 548 F.2d at 949, 212 Ct.Cl. at 392. The public's interest in continued enjoyment of the aesthetic, historical and cultural values embodied in the Willard Hotel was not a sufficient basis for denying plaintiffs compensation where this interest manifested itself in a total prohibition of any economically viable use of the property.

undeveloped state, the court held that there was a taking because plaintiffs were denied "the ordinary and essential uses and rights of private ownership." *Id.* at 696; *see also Drakes Bay Land Co. v. United States*, 424 F.2d 574, 191 Ct.Cl. 389 (1970) (taking found where landowner was prevented from developing its land by government officials bent on incorporating it into the Point Reyes National Seashore).

Contrary to defendant's assertion, courts do not view the public's interest in environmental and aesthetic values as a servitude upon all private property, but as a public benefit that is widely shared and therefore must be paid for by all. This concept was expressed well by the Supreme Court of Maine in *State v. Johnson*, 265 A.2d 711 (Me.1970), a case much like ours. There, as here, the landowner was denied a permit to develop wetlands. The court found a taking without just compensation, reasoning that:

> [T]he area of Wetlands representing a "valuable natural resource of the State," of which appellants' holdings are but a minute part, is of statewide concern. The benefits from its preservation . . . are state-wide. The cost of its preservation should be publicly borne. To leave appellants with commercially valueless land in upholding the restriction presently imposed, is to charge them with more than their just share of the cost of this state-wide conservation program, granting fully its commendable purpose.

265 A.2d at 716.[20] *See also Annicelli v. Town of South Kingstown*, ___ R.I. ___, 463 A.2d 133 (1983) (ordinance

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[20] *State v. Johnson*, like some of the other decisions cited, was interpreting a state's constitution. The court's reasoning is

designed to preserve beaches in a natural state found to work a taking); *Bartlett v. Zoning Commission*, 161 Conn. 24, 282 A.2d 907 (1971) (ordinance that forbade owner from filling marsh held a taking where objective was to avoid the destruction of wetlands); *Dooley v. Town Plan & Zoning Commission*, 151 Conn. 304, 197 A.2d 770 (1964) ("[w]here most of the value of a person's property has to be sacrificed so that community welfare may be served . . . the occasion is appropriate for the exercise of eminent domain"); *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 40 N.J. 539, 193 A.2d 232 (1963) (taking found where the effect of regulation was to preserve land in its natural state to act as a flood basin); *Hager v. Zoning Commission*, 261 S.W.2d 619 (Ky. 1953) (zoning regulation preserving land as a "ponding area" found to work a taking).

ii. Where government entirely prohibits development of property for purposes of maintaining environmental values or to serve other police power interests, it frequently provides a remedy to compensate the owner, at least partially, for his loss. Such a remedy generally saves the provision from constitutional infirmity. For example, in *Penn Central* a city ordinance prohibited the proposed development of Grand Central Station because the project would have destroyed the terminal as a historic landmark. The ordinance, however, provided that the owners would have "transfer rights" to develop other

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nonetheless persuasive, particularly since the pertinent state constitutional provision is identical to the federal one. Indeed, the court quoted Mr. Justice Holmes' opinion in *Pennsylvania Coal*.

property. In upholding the validity of the ordinance, the Court noted that the property owners' interests had been considered and a reasonable attempt had been made to accommodate them. *Penn Central Transportation Co.*, 438 U.S. at 137-38, 98 S.Ct. at 2665-66; *see also Shanghai Power Co. v. United States*, 4 Cl.Ct. 237, 246-47 (1983) (no taking where government sought to accommodate all relevant interests and its "action[s] resulted in both direct and incidental benefits to plaintiff"), *aff'd mem.*, 765 F.2d 159 (Fed.Cir. 1985).

Perhaps the most apposite examples of this practice are federal statutes dealing with conservation in national parks and wilderness areas. Under the Wilderness Act, Congress sought to preserve certain areas of the United States in a natural state. The Secretary of Agriculture is directed to assure adequate access to private land surrounded by these wilderness areas, or to exchange the land for federal land of equal value. 16 U.S.C. § 1134 (1982). Similarly, the National Trails System Act provides for a system of exchange and/or monetary compensation for the acquisition of private land within a national scenic or historic trail right-of-way. 16 U.S.C. § 1246(f) (1982). The Wild and Scenic Rivers Act also allows the Secretaries of Agriculture and the Interior to acquire private land within a national wild and scenic river system by the exchange of equivalent land and/or monetary compensation. 16 U.S.C. § 1277(d) (1982).[21]

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[21] In this regard, the Court of Appeals for the Federal Circuit has recently noted as follows:

> Where the question is whether a regulation not meant to take an interest in land is so onerous as to effect a

Most interesting, though, is the Water Bank Act. Under this act, Congress recognized that "it is in the public interest to preserve, restore, and improve the wetlands of the Nation, and thereby to conserve surface waters, to preserve and improve habitat for migratory waterfowl and other wildlife resources." 16 U.S.C. § 1301 (1982). The Secretary of Agriculture is authorized to enter into agreements with land owners to effectuate the purposes of this act. These agreements are to provide for annual payments at rates the Secretary has determined to be fair and reasonable to compensate the landowner for conserving the wetlands on his property. 16 U.S.C. § 1304 (1982). Defendant is no doubt correct in arguing that the nation has an interest in preserving the environment and aesthetic values represented by wetlands. The question is: How are these benefits to be paid for? As Mr. Justice Brennan recognized in *San Diego Gas & Electric Co.*, "[f]rom the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation." 450 U.S. at 652, 101 S.Ct. at 1304. However, Congress recognized in the Water Bank Act that the public may enjoy the benefits of undisturbed wetlands only by paying compensation to

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> taking by imputation, and with no provision for money compensation, the availability of substitution rights may be important in determining whether the regulation is something the landowner can live with without unfairness.

Whitney Benefits, Inc., 752 F.2d at 1557.

the property owner who is thereby deprived of the use of his land.[22]

What these regulatory schemes have in common is that in each case the property owner's interest has been considered and accommodated, not sacrificed on the altar of the public interest. By contrast, the regulatory scheme pursuant to which plaintiff's land was rendered economically useless provides for no accommodation whatsoever of plaintiff's right to use and enjoy its property. In determining whether to issue plaintiff a permit, the Corps did not so much as consider plaintiff's obvious interest. The permitting process, which lasted 12 months, involved a thorough study of the *public* impact of the proposed rock mining project. Comments were requested and received from numerous federal, state and local agencies engaged in protection of environmental resources. The decisional document, issued October 2, 1980, reviewed these comments and then considered 14 separate "Public Interest Factors," which included such matters as the effect of the

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[22] This expression of congressional policy is not without significance in determining whether the government's action here amounts to a taking. In *Drakes Bay Land Co.*, involving the creation of the Point Reyes National Seashore in California, the court found a taking, specifically noting that "Congress enacted [the Point Reyes National Seashore Act] requiring and expecting that an equitable acquisition program would be effected." 424 F.2d at 582, 191 Ct.Cl. at 404. In *Althaus*, this court recently found a taking where land was kept in its natural state in anticipation of its acquisition for a national park, noting: "Congress reflected its appreciation of the fifth amendment by requiring that an equitable acquisition program be used with reasonable promptness at Voyageurs [National Park]." *Althaus*, 7 Cl.Ct. at 696.

proposed project on fish and wildlife, aesthetics and the economy. The project was found to have many adverse effects. The only beneficial effects the Corps found were enhancement of the economy, expansion of job opportunities and stimulation of competition. The Corps minimized the significance of these positive factors by noting that rock mining permits had been issued to some of plaintiff's competitors, this in the Corps' view providing sufficient alternative sources of limestone, as well as sufficient employment and competition.[23] That denial of the permit would visit grave economic harm upon plaintiff, harm that is only aggravated by issuance of mining permits to its competitors, was not so much as mentioned in the Corps' memorandum of decision.

The court suggests no wrongdoing or dereliction of duty in the Corps' failure to consider plaintiff's private loss in its decision on whether to issue a permit. Plaintiff has conceded the validity of the permitting process and does not claim that the Corps considered impermissible factors or failed to consider factors it should have. It is therefore deemed established that the Corps scrupulously followed the regulatory scheme in its consideration and denial of plaintiff's application. The process itself, however, is geared to take into account only the public's interests in how the property will be used; the owner's

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[23] The permits approved by the Corps were for rock mining in an area east of the Dade-Broward levee, a local landmark. The Corps denied plaintiff's permit pursuant to what the court finds to have been a deliberate, but unannounced, policy of "zoning" the area west of the Dade-Broward levee, north of the Tamiami Trail and east and south of Krome Avenue as undisturbed wetlands where no significant development would be permitted.

private interest is ignored. The difficulty arises because the property in question does not belong to the public but to plaintiff. It may be perfectly appropriate to consider only public interest factors when determining the use of public land. However, when government treats private land as if it were its own, ignoring the interest of the property owner and rendering the property economically useless, it has worked a taking and, under our constitution, compensation is due.

5. *The Power of the Federal Government Over Navigable Waterways*

Defendant's final argument is that denial of the permit is not a compensable taking because it is an exercise of the federal government's power to regulate the nation's waterways. In defendant's view, Congress may prohibit, without compensation, all "private activities which pollute, degrade, or diminish the waters of the United States and their alternate resources."

This argument adds nothing to the analysis in light of the issues already resolved by the court. The fact that plaintiff's proposed mining operation would involve wetlands does not by some peculiar alchemy protect the government from the fifth amendment's takings clause any more than the other incantations it has invoked. As the Supreme Court noted in *Kaiser Aetna*, "[r]eference to the navigability of a waterway adds little if anything to the breadth of Congress' regulatory power over interstate commerce." 444 U.S. at 173, 100 S.Ct. at 389. Even when the property in question is a navigable waterway, the United States may be required to pay compensation

where it unduly interferes with the property owner's right to use and enjoy its property. *Id.* at 175-79 & n. 10, 100 S.Ct. at 390-93 & n. 10. This reasoning applies a fortiori where plaintiff's property is concededly not a navigable waterway and where the Corps' action was not taken to improve navigation.[24] To the extent denial of the permit is otherwise deemed a taking, it will not be converted into something else because water happens to be involved.

Conclusion

Denial of the dredge and fill permit by the Corps of Engineers constituted a taking of plaintiff's property for which compensation is due. The taking occurred on October 2, 1980, the date the permit was denied. The amount of compensation to which plaintiff is entitled will be determined in further proceedings.

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[24] In denying plaintiff's permit application, the Corps noted that there were no applicable navigation concerns. Finding of Fact and Environmental Assessment on Permit Application 79P-1334, at 7 (Oct. 2, 1980).

IN THE UNITED STATES CLAIMS COURT

No. 266-82 L

FLORIDA ROCK INDUSTRIES, INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

(Filed May 20, 1985)

ORDER ON VALUATION

In accordance with the findings announced following the trial on valuation which commenced April 22, 1985, and concluded May 7, 1985, the Court finds as follows:

1. As of the date of taking, October 2, 1980, the value of the entire 1,560-acre parcel owned by plaintiff Florida Rock Industries, Inc., is:

1,240 acres at $7,500 per acre	$ 9,300,000
320 acres at $4,000 per acre	1,280,000
Total	$10,580,000

2. As of the date of taking, October 2, 1980, the value of the 98-acre parcel owned by plaintiff Florida Rock Industries, Inc., for which a dredge and fill permit was denied by the U.S. Army Corps of Engineers, is:

98 acres at $10,500 per acre	$1,029,000

3. In addition, plaintiff is entitled to recover interest on the value of the parcel ultimately determined to have been taken from the date of taking until payment by the government, computed at the rates established by the

Contract Disputes Act, Pub.L.No. 92-41, 85 Stat. 97. *See Foster v. United States*, 3 Cl.Ct. 738, 745 (1983); *Cloverport Sand & Gravel Co., Inc. v. United States*, 6 Cl. Ct. 178 (1984). The applicable rates thus far established are:

July-Dec. 1980	10½ percent
Jan.-June 1981	14⅝ percent
July-Dec. 1981	14⅞ percent
Jan.-June 1982	14¾ percent
July-Dec. 1982	15½ percent
Jan.-June 1983	11¼ percent
July-Dec. 1983	11½ percent
Jan.-June 1984	12⅜ percent
July-Dec. 1984	14⅜ percent
Jan.-June 1985	12⅛ percent

4. Within thirty days of the date of this Order, plaintiff shall submit its application for attorneys' fees and expenses. The plaintiff's application shall be supported by itemized documents detailing the actual time devoted to this case, the standard hourly billing rates of all individuals who worked on the case, any amounts paid to experts, and any other expenses for which reimbursement is claimed. The defendant shall file its response within thirty days of the filing date of plaintiff's application. Plaintiff may file a reply to defendant's response not later than 14 days after the filing of defendant's response.

May 17, 1985

/s/ Alex Kozinski
Alex Kozinski
Chief Judge

IN THE UNITED STATES COURT OF CLAIMS

FLORIDA ROCK INDUSTRIES, INC., Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)	Docket No. 266-82 L (Filed May 25, 1982)

PETITION

Jurisdiction, Parties and Nature of this Action

1. This action arises under the Fifth Amendment to the Constitution of the United States. The amount in controversy exceeds $10,000, exclusive of interest and costs. The jurisdiction of the Court is founded on 28 U.S.C., Section 1491.

2. Plaintiff Florida Rock Industries, Inc. ("Florida Rock") is a corporation organized under the laws of the State of Florida, with its principal place of business in Duval County, Florida.

3. Plaintiff brings this action seeking an award of just compensation under the Fifth Amendment to the Constitution of the United States for the value of property taken by the United States from plaintiff for public use, and for other damages suffered by plaintiff as a result of that taking.

Real Property Involved

4. Plaintiff is the owner or holder of record title to the following described real property situated in Township 53 South, Range 39 East, Dade County, Florida (hereinafter "real property at issue"):

Section 19, less the North 330 feet of the South 370 feet thereof; and

All of Section 31; and

The West 1/2 of Section 29:

Subject to:

a. The rights and reservations contained in that certain deed recorded in Deed Book 46, at page 240, of the Public Records of Dade County, Florida; and

b. Rights and reservations as contained in that certain deed recorded in Deed Book 2469, at page 418, of said county, respecting the aforesaid Section 19, less the North 330 feet of the South 370 feet thereof; and

c. Rights and reservations respecting the South 130 feet of the Southwest 1/4 of said Section 29, and the North 130 feet of said Section 31, all as contained in that certain deed recorded in official Records Book 2274, page 536, of the Public Records of Dade County, Florida.

comprising a total area of approximately 1,560 acres.

5. The real property at issue is located above the mean high water mark and is not subject to tidal inundation. It is located west of the developed coastal region of Dade County and immediately east of Central & Southern

Florida Flood Control District water conservation area No. 3-B. The U. S. Army Corps of Engineers, Jacksonville Divison [sic], by memorandum dated July 23, 1979, file SAJOD-R, determined that the area in which the real property at issue is located is a wetland area subject to Corps of Engineers jurisdiction under Section 404 of the Federal Water Pollution Control Act Amendments of 1972 [enacted on October 18, 1972, as Public Law 92-500, codified as 33 U.S.C. § 1344].

6. As more fully alleged herein, plaintiff had mined limestone upon the real property at issue until such mining was halted by the issuance of a cease and desist order by the U. S. Army Corps of Engineers on September 7, 1978. The instant controversy stems from the denial by the U. S. Army Corps of Engineers, on October 2, 1980, of the dredge and fill permit required to re-commence plaintiff's mining activity. Plaintiff had not only ceased mining activity, but had, as far as possible, restored the real property in issue to its initial state, as it was required to do by the Corps of Engineers as a condition precedent to processing plaintiff's dredge and fill permit application.

Plaintiff's Search for and Purchase of Suitable Mining Lands, Procurement of Mining Approval and Commencement of Mining Operations

7. In the mid 1960's, the known sources of limestone and lime rock suitable for the production of construction aggregates in Florida were Brooksville, Ft. Myers, Live Oak and Dade County. Plaintiff realized that the existing

sources in Brooksville, Ft. Myers and Live Oak had limited reserves and would be unable to supply the projected demand for public and private construction in the state and began efforts to acquire property with limestone and lime rock reserves in Dade County.

8. Accordingly, Plaintiff began negotiations in 1966 with representatives of the John W. Andrus Estate, which owned potentially suitable limestone mining property in western Dade County, Florida.

9. Negotiations with the Andrus Estate for the purchase of suitable mining property spanned several years. It was always a condition of Florida Rock's offers to acquire any interest in property of the Andrus Estate that any contract for such acquisition would be subject to Florida Rock's ability to obtain the necessary mining permits from appropriate authorities.

10. Plaintiff offered to purchase the real property at issue from the Andrus Estate, and a contract of sale and purchase for a sales price in the amount of $2,964,000 (exclusive of interest on installment payments) was executed in March, 1972.

11. The closing of that contract was specifically contingent upon Florida Rock's ability to obtain the necessary zoning to permit the mining of limestone.

12. In accordance with the provisions of the contract of sale and purchase, Florida Rock applied for the necessary zoning to permit the mining of limestone on the property at issue by lake excavation over a period of years. This permission was initially denied by county

authorities, which caused the plaintiff to delay the closing of the purchase of the real property at issue. Only after the necessary zoning was granted after appeal to the Dade County Board of Commissioners did plaintiff purchase the real property at issue on September 21, 1972. At that time limestone mining on the real property at issue required no approval from the Corps of Engineers.

13. After receiving the zoning approval, plaintiff obtained the required zoning use permit from Dade County, Florida, which permit has been renewed as required, to the present time.

14. Plaintiff posted a performance bond with Dade County to guarantee construction of the excavation of the property according to plans submitted to and approved by Dade County, and incurred substantial costs premised upon its rights as owner of the property to conduct limestone mining operations.

15. Plaintiff, in 1974, commenced mining operations on the property at issue, which consisted, *inter alia*, of filling a road into the property, stripping the three to four feet of overburden from the limestone, and wet mining the limestone by dragline. Mining operations on the real property in issue were not intensive until 1978, when plaintiff granted a royalty lease to George Pappas, to increase mining on the property at issue.

16. On September 7, 1978, the District Engineer, U. S. Army Corps of Engineers, Colonel James W. R. Adams, issued his cease and desist order to plaintiff's lessee Pappas, requiring him to halt any further mining work. Colonel Adams asserted that the mining activity was taking place in an area subject to his jurisdiction

under the Federal Water Pollution Control Act Amendments of 1972 and that a Department of the Army permit was necessary to conduct excavation and filling.

17. In compliance with the Corps of Engineers cease and desist order, Florida Rock and its lessee immediately ceased further mining activities and restored the area by returning the top soil stockpiled alongside the de-mucked areas to its former location and configuration. The Corps required this restoration as a condition precedent to the processing of a dredge and fill permit application by the Corps of Engineers.

Application for and Denial by the Corps of Engineers of the Necessary Dredge and Fill Permit

18. In September, 1979, Florida Rock filed its application for a Department of the Army permit for the excavation and processing of limerock and limestone to be used as construction aggregate by the construction industry in road and highway maintenance and construction, as well as in the construction of private residences and of commercial and governmental buildings and facilities.

19. At the request of the District Engineer, plaintiff's application was submitted for an interim three-year dredge and fill permit and was limited to mining activities in Section 31 only. Plaintiff clearly stated in its application that had it not been for the District Engineer's request for an interim application, the application would have been for the full scope of the overall development

plan as previously approved by the Dade County Commission. A copy of the overall plan for the mining development, as previously approved and permitted by the Dade County Commission, was attached to the application.

20. The Department of the Army permit application submitted by Florida Rock was processed by the U. S. Army Corps of Engineers. On October 2, 1980, the District Engineer for the Jacksonville, Florida District of the Corps of Engineers, by the authority of the Secretary of the Army, denied the permit after reviewing it in accordance with Department of the Army regulations. Findings of fact and an environmental assessment, prepared during the processing of the Florida Rock permit application, were also filed on October 2, 1980. They reveal that denial of the permit was based on review of the application under guidelines published by the Administrator of the Environmental Protection Agency, published at 40 Code of Federal Regulations, Part 230, and the Army Corps of Engineers Wetland Policy, published by the Department of the Army at 33 Code of Federal Regulations, Part 320. The development and implementation of these regulations was mandated by the United States Congress in Section 404(b) of the Federal Water Pollution Control Act Amendments of 1972.

21. The essential basis for the denial of the permit was that the mining activity would result in the destruction of prime undisturbed Everglade wetlands and associated fish and wildlife resources.

Effect of Denial of the Permit Application

22. Plaintiff's interim dredge and fill permit was denied by the Corps of Engineers pursuant to guidelines promulgated by the Administrator of the Environmental Protection Agency and the regulations promulgated by the Department of the Army, which state that wetlands are vital areas constituting productive and valuable public resources, the loss of which should be discouraged as contrary to public interest. There are no economic uses that can be made of plaintiff's land without altering its wetland character; indeed, rock mining, as proposed in the September 24, 1979 application as modified on December 13, 1979, provides the minimum environmental disruption of any possible economic use. Therefore, the denial of the plaintiff's application for an interim dredge and fill permit demonstrates that the Corps will also deny dredge and fill applications for other economic uses, which would, of necessity, require the alteration of the wetland character of the land, and the submission of additional and/or alternative dredge and fill permit applications would, therefore, be futile.

23. Denial of the dredge and fill permit application has deprived plaintiff of all reasonable economic use of the real property at issue.

Cause of Action

24. The property at issue was purchased, the mining plan developed, and approved by the Dade County Commission, and mining was commenced before the Environmental Protection Agency and the U. S. Army Corps of

Engineers pursuant to the Congressional mandate contained in Section 404(b) of the Federal Water Pollution Control Act Amendments of 1972, developed and promulgated regulations which have declared that wetlands such as those found on the real property at issue are now to be considered important public resources, the destruction of which by development is contrary to the public interest.

25. The denial of the permit application by the Corps of Engineers imposes a preservation easement, for the benefit of the public, upon the plaintiff's property by denying it the dredge and fill permits necessary for any economic use of the property, in order to preserve the wetlands located upon the property at issue.

26. The imposition of the preservation easement wholly frustrates plaintiff's reasonable investment backed expectations, denies plaintiff all practical, beneficial and economic use of the property, and so wholly destroys the economic value of the property as to constitute a taking of the property without just compensation in violation of the Fifth Amendment to the Constitution of the United States.

WHEREFORE, plaintiff prays for the following relief:

(1) Judgment in its favor and against the defendant, the United States of America, in an undetermined amount of damages equal to the diminution in value of plaintiff's property, and other losses which plaintiff has incurred by reason of the denial of the permit, such amount being several millions of dollars; and

(2) Such other and further relief, including reasonable attorney's fees, as may be necessary and appropriate.

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Supreme Court, U.S.
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No. 94-511

In the

Supreme Court of the United States

October Term, 1994

FLORIDA ROCK INDUSTRIES, INC.,
Petitioner,

v.

THE UNITED STATES,
Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR CERTIORARI FILED BY PETITIONER FLORIDA ROCK INDUSTRIES, INC.

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No. 94-511

In the

Supreme Court of the United States

October Term, 1994

FLORIDA ROCK INDUSTRIES, INC.,
Petitioner,

v.

THE UNITED STATES,
Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR CERTIORARI FILED BY PETITIONER FLORIDA ROCK INDUSTRIES, INC.

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, public interest law foundation which works for the protection of private property rights and a balance in governmental regulation. PLF attorneys represented, for example, the Nollans in *Nollan v. California Coastal Commission*,

483 U.S. 825 (1987), and PLF has frequently filed amicus briefs in support of property rights.

Letters of permission to file this brief have been lodged with this Court pursuant to Supreme Court Rule 37.

SUMMARY OF ARGUMENT

If the Just Compensation Clause of the Fifth Amendment to the United States Constitution is to have any *practical* meaning in the context of regulatory takings, government agencies must not be able to point to a *theoretical* "residual" and speculative value remaining in a regulated property to support the argument that because the property has some value there has been no taking. The fair market value of property, in the context of the Just Compensation Clause, in *both* straight condemnation and inverse condemnation cases, must not be overly influenced by unreasonable speculation or buyer ignorance. To require an undue consideration of the speculative value in property would be a poor public policy choice because it would encourage land sales to the unwary.

ARGUMENT

I

INTRODUCTION

This decade-old case involves the question of whether the owner of a regulated wetland can ever receive just compensation for a regulatory taking. Florida Rock's petition asks in particular how a court should determine how much, if any, value remains in a parcel of property after a

regulation prohibits all productive use of that property. In an otherwise well-reasoned and well-written decision, the Federal Circuit Court of Appeals below seriously erred in establishing guidelines for determining the fair market value of property that is rendered unusable by the application of federal wetlands regulations. In derogation of the ethical foundations of the law, the Federal Circuit ruled that the fair market value should reflect the degree to which property retains some residual or speculative value based on a market constituted of unknowledgeable "investors" from Arizona and elsewhere who might have been willing to purchase the proverbial swampland in Florida--swampland made utterly unusable by government regulation. *See* Opinion of Federal Circuit Court of Appeals, reprinted in Petitioner's Appendix at 15-16.

While the court below properly noted that there still might be a regulatory taking even if some value remains in a parcel, it incorrectly determined that the value should be influenced by a questionable offer from an Arizona speculator or mere speculation--even speculation as remote (and irrelevant) as the possibility that the offending regulation might someday be rescinded. *Id.* at 16. In other words, because persons might be willing to purchase the property either out of ignorance or because of a speculative hope that the offending regulation might be eliminated, the court found that the property had a significant fair market value, lessening the possibility that a court could find that a regulatory taking has occurred. *Id.*

This Court has never before determined how fair market value should be determined in the context of a regulatory taking case. The notion of the court below that the speculative value of property, a value that can exist only in a vacuum where the impact of the offending regulation is ignored, is contrary to the principles of equity inherent in the Fifth Amendment. It is also contrary to prior decisions of this and other federal courts which have considered the

meaning of fair market value in the context of government condemnation litigation.

II

THE DETERMINATION OF A PROPERTY'S VALUE DEPENDS ON ITS FAIR MARKET VALUE WHICH IN TURN DEPENDS ON A MARKET OF KNOWLEDGEABLE BUYERS IN A WORLD IMPACTED BY ALL RELEVANT GOVERNMENT REGULATIONS

A key factor in determining whether or not there has been a regulatory taking of private property is whether the regulation denies a property owner of "economically viable use" of an affected property. *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980). This will depend in part upon the "economic impact" of the regulation and the degree to which the "regulation has interfered with distinct investment-backed expectations." *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 124 (1978). A regulation which destroys all "economically beneficial or productive use of land" is a per se taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. __, 120 L. Ed. 2d 798, 813 (1992)[1]. If the court below is correct, however, *Lucas* is a nullity because no property can ever lose all its value if value must include speculation that the offending regulation will be

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[1] *See also* 120 L. Ed. 2d at 814 ("productive or economically beneficial use of land," "economically beneficial or productive options for its use") and 120 L. Ed. 2d at 815 (a taking if regulation leaves "property economically idle").

Of course, as the court correctly noted below, there can be a taking even if less than all value of property is destroyed. Opinion, Petitioner's Appendix at 25-28.

removed or consideration of investors not fully aware of the scope of a regulation. Furthermore, this Court's focus in *Lucas* on the "use" of land being denied would also become a nullity because "use" and "value" are distinct concepts.

The decision below will also force courts to embrace two distinct and contradictory definitions of fair market value of property. One definition will be used for traditional condemnation cases, where this Court and the lower courts have routinely eschewed the influence of unsubstantiated speculation. The other definition will apply in inverse condemnation cases where speculation will be embraced. This speculation, furthermore, will depend not only on the hopes of the traditional speculator looking to make a killing in the retail land sales market, but also a new breed of speculator looking to make a killing by buying up heavily regulated properties in the hope that the regulations might someday disappear. *See* Opinion, Petitioner's Appendix at 16.

A. Fair Market Value Depends on Knowledgeable Buyers

In the past, in eminent domain cases, the government not surprisingly has argued that "fair market value" should not encompass knowledge when it is based on unrealistic speculation. The decision below turns this principle on its head. Decisions from the lower federal courts exemplify the state of the law prior to the decision below. In *Robertson v. Routzahn*, 75 F.2d 537 (6th Cir. 1935), *cited in Black's Law Dictionary*, it was held:

> Fair market value is the price in money or its equivalent that the property will bring at a voluntary sale to a willing buyer, both the seller and

> buyer *having adequate knowledge of the material facts affecting the value.*

75 F.2d at 539 (emphasis added).

Not only do courts require knowledge to be a basis of determining fair market value, but courts also have required that knowledge to be reasonable. For example in condemnation cases, where the federal government has argued for a lower fair market value, the government has strenuously argued *against* consideration of the speculative value of property--which is of course exactly what the government is arguing *for* in this case. The courts, however, have steadfastly agreed with the government's usual position that unwarranted speculative value of property should be ignored in determining fair market value. Thus, in *United States v. 117,763.00 Acres of Land in Imperial County, California,* 410 F. Supp. 628 (S.D. Cal. 1976), *aff'd sub nom. United States v. Shewfelt Investment Co.,* 570 F.2d 290 (9th Cir. 1977), the court held:

> [T]he market value of these lands is not the kind of a market value on which a condemnation award should be based .... There is no doubt that speculators have traded in the land and have, in that sense, established a market.
>
> If the market value of land is based on speculation, then it is proper in determining just compensation to ask on what the speculation depends. Does it depend upon an appraisal of the land in terms of its uses ... [o]r does it depend upon the thesis that there's a sucker born every minute and that, if the large tracts of land are broken into smaller tracts, sooner or later the

land can be sold at a profit even if it has no value?

410 F. Supp. at 631-32.

This Court has also cautioned against excessive use of speculation. In *Olson v. United States,* 292 U.S. 246, 257 (1934), this Court disallowed "mere speculation and conjecture to become a guide for the ascertainment of value." *See also McCandless v. United States,* 298 U.S. 342, 345 (1936) (fair market value is "most profitable use to which the land can probably be put in the reasonably near future"; *United States ex rel. Tennessee Valley Authority v. Powelson,* 319 U.S. 266, 275 (1943) (value includes uses to which land "may be readily converted"); *see also Klein v. United States,* 152 Ct. Cl. 221 (1961) (court considered reasonable speculation based on more realistic possibilities, but court did not accept the full speculative value). The trial court below correctly rejected basing the fair market value of the property on a lack of knowledge or unreasonably speculative "dreams of avarice." Opinion of United States Claims Court, *reprinted in* Petitioner's Appendix at 80. The Court of Appeals' embrace of speculative value is thus inconsistent with prior opinions of this Court.

B. Public Policy Would Not Be Served by Adopting a "Caveat Emptor" Definition of Fair Market Value

The opinion of the court below will result in the denial of inverse condemnation awards to property owners when there might be a market for the property among investors unaware of the true consequences of the impacts of a particular regulation or among persons willing to bet that the regulation may someday be rescinded. If the only way a property owner could receive value for a regulated property would be to sell it not to the government but to unsophisticated or foolish buyers, there would be a most peculiar and penurious result. By encouraging companies like Florida

Rock to foist their wetlands properties on the unsuspecting public, ultimately only the smallest and most unsophisticated investors would end up holding these worthless properties.[2] And these small investors are those who are least likely to have the resources to sue the government for a takings claim! These small landowners would quickly become broke--certainly not an intended consequence of either the wetlands regulations or the Constitution. Yet, if the decision below were to remain supporting a market value based on a hope of perpetual public ignorance, then large landowners like Florida Rock would be forced to engage in immoral, if not illegal, practices in order to avoid the consequences of government's evasion of its responsibilities under the Takings Clause.

A public policy that forces small and unsuspecting investors to bear the brunt of the cost of regulatory takings, and a public policy that is directly aimed at taking the property of those individuals least able to fight back, is surely, in the words of John Locke, a tyrannical policy:

> For where-ever the Power that is put in any hands for the Government of the People, and the Preservation of their Properties, is applied to other ends, and made use of to impoverish ... it presently becomes Tyranny.

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[2] This also might be illegal. If Florida Rock's 98 acres were subdivided into many smaller lots, then the federal Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701, *et seq.*, and Florida's Land Sales Practices Act, Fla. Stat. § 497.001, *et seq.*, would make it mandatory to disclose to potential buyers that the land is unbuildable. With such disclosure, it is likely that although the property would never dry up, land sales would. In short, there is no honest fair market value for this land.

Locke, *Second Treatise on Government* § 201 (emphasis in original). *See also* Sections 199, 222, and 229.

III

CONCLUSION

In analyzing the economic impact of a government regulation, the courts must be directed to evaluate the fair market value of the property before and after imposition of the regulatory requirement without regard to a pool of unwary or foolish investors who speculate that the regulation causing the alleged regulatory taking might someday be lifted. Otherwise property owners would be forced to peddle regulated properties to the uninformed who have a bit of cash but no understanding of the less than benign nature of government and the effects of its regulatory mechanisms. Sound public policy should not be dependent on schemes that place the greatest burden of regulatory programs on those least able to understand and afford the cost. The petition for certiorari should be granted.

DATED: October, 1994.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1994

FLORIDA ROCK INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly ruled that the trial court must take the post-regulatory market value of the subject property into account in determining whether a taking has occurred.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-52) is reported at 18 F.3d 1560. The opinion of the United States Claims Court (now the Court of Federal Claims)[1] (Pet. App. 57-91) is reported at 21 Cl. Ct. 161. A previous

[1] This action was originally commenced in the United States Court of Claims (Pet. App. 168). The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, abolished that court and assigned certain of its former functions to a newly created United States Claims Court. The Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506, in turn renamed that court "Court of Federal Claims." For convenience, we will use the trial's court current name to refer to proceedings held and decisions rendered by it and each of its predecessor courts.

opinion of the court of appeals in this case (Pet. App. 92-121) is reported at 791 F.2d 893. A previous opinion by the United States Claims Court (Pet. App. 122-165) is reported at 8 Cl. Ct. 160.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1994. Cross-petitions for rehearing were denied on June 21, 1994 (Pet. App. 53-56). The petition for a writ of certiorari was filed on September 19, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. The Clean Water Act was enacted in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 101(a), 33 U.S.C. 1251(a). Under Section 301(a) of the Act, 33 U.S.C. 1311(a), discharges of pollutants into the "navigable waters" are illegal, unless conditions found in other specified sections of the Act are satisfied. See 33 U.S.C. 1362(12). One of those specified sections is Section 404 of the Act, 33 U.S.C. 1344, which authorizes the Secretary of the Army—acting through the Chief of Engineers—to issue permits for the discharge of dredged or fill materials into the "navigable waters." See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

Petitioner is a company engaged in the mining, processing, and sale of crushed stone and aggregates. Pet. App. 123. In 1972, petitioner purchased for $2,964,000 a 1,560-acre tract in southern Florida. The site, which is located west of metropolitan Miami, consists of undeveloped wetlands underlain by limestone.

Petitioner purchased the tract to mine the limestone. *Id.* at 4-5, 94-95.

In October 1979, after the enactment of Sections 301(a) and 404 of the Clean Water Act, petitioner applied to the Corps under Section 404 of the Act for a permit to mine 98 acres of the 1,560-acre parcel.[2] The Corps of Engineers gave notice of the application to various federal and local agencies and instrumentalities, many of which submitted environmental objections to the application. In October 1980, the Corps denied petitioner's application, determining that the requested permit would not be in the public interest, because of the adverse environmental impacts of petitioner's proposed activities. Pet. App. 96-97, 126.

2. Petitioner did not seek judicial review of the Corps' administrative determination. Instead, petitioner brought the present action in the Court of Federal Claims, contending that the permit denial constituted a taking of the entire 1,560-acre property and seeking the payment of just compensation. Pet. App. 176.

In the liability phase of its bifurcated proceedings, the Court of Federal Claims held that the denial of the permit constituted a taking of the 98-acre tract, but not of the remainder of the 1,560 acres. The Court of Federal Claims found that rock mining was the only economically viable use of the property (Pet. App. 127) and that the proposed rock mine "would not * * * result[] in pollution of the water supply" (*id.* at 155). Following a trial on valuation, the Court of Federal

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[2] At that time, the Corps requested limestone mining firms to submit applications only for three-year permits (Pet. App. 59, 126). Petitioner did not challenge the Corps' request, and limited its application to 98 acres of the property, an estimated three years' production.

Claims concluded that just compensation for the 98 acres amounted to $1,029,000, plus interest (Pet. App. 166-167).

3. Both sides appealed. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings. *Florida Rock Indus., Inc.* v. *United States*, 791 F.2d 893 (Fed. Cir. 1986) (Pet. App. 92-121). The court affirmed the trial court's determination that petitioner could have no valid takings claim for more than 98 acres of the entire 1,560-acre tract. Pet. App. 118-120. The court vacated, however, the finding that a taking of property had occurred and remanded the case for further consideration because (*id.* at 94) "[t]he trial judge failed to apply the evidence in a manner correct in all respects to determine whether he had an actual instance of a taking before him."

The court of appeals specified two errors in the analysis employed by the Court of Federal Claims. First, the court of appeals concluded that the trial court lacked jurisdiction to review the Corps' conclusion that petitioner's proposed activities would in fact cause pollution. Pet. App. 102-104. Second, the court of appeals found that the trial court also erred in failing to consider the effect of the regulatory action on the market value of the property as one of the factors bearing on whether a taking had occurred. *Id.* at 109-112. Relying upon *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-225 (1986), the court of appeals stated that the factors pertinent to the ad hoc factual inquiry of whether a particular governmental action constitutes a taking include the economic impact of the regulations on the claimant, the extent to which the regulations interfere with distinct investment-backed expectations, and the character of the government action. Pet. App. 109. By disregarding the value at which the subject parcel could be resold on the existing market, the court of appeals

concluded, the trial court had failed to give proper consideration to the economic impact factor.

Petitioner sought this Court's review, contending, *inter alia*, that the court of appeals improperly had required consideration of the property's post-regulatory market's value, because that value was based on speculation that, sometime in the future, the Corps might issue a permit allowing the land to be used for mining. See U.S. Br. in Opp. at 8-9, No. 86-465. This Court denied certiorari. 479 U.S. 1053 (1987).

4. On remand, the Court of Federal Claims held a second liability trial. As in the initial trial, it was undisputed that, at the time of the alleged regulatory taking, there had existed a local real estate market in which numerous wetlands properties (which were also subject to the Clean Water Act) had been bought and sold. Pet. App. 14-15, 77-79. The government asserted that the return that petitioner could have realized by selling the subject parcel on that market must be considered in determining whether the denial of petitioner's permit application constituted a taking. The government also contended that appropriate consideration of that market would lead to the conclusion that no taking occurred. Petitioner, without disputing the existence of a market in which similar wetland properties were being bought and sold for substantial prices, maintained that that market should be disregarded, because it was dominated by speculators who were generally unaware of applicable land use restrictions (such as Sections 301(a) and 404 of the Clean Water Act). Pet. App. 11-17 & n.12.

The Court of Federal Claims accepted petitioner's argument. It ruled that because the local market was comprised of purchasers who were generally unaware of land use regulations that could impede development, that market was not a "'fair' market." Pet. App. 77-85. The

court accordingly rejected the testimony of the government's expert, who had reviewed arms-length transactions involving comparable properties and had concluded that the subject land retained a value of $4,000 per acre. *Id.* at 79-80. After finding no other economically viable use for the property, the court concluded that the subject tract retained only a nominal value of $500 per acre after the denial of the permit application. In the court's view, that diminution in value (from the $10,500 per acre pre-regulatory value), when considered with other factors, constituted a regulatory taking. *Id.* at 87-90. The court again awarded $1,029,000, plus interest, to petitioner. *Id.* at 90.

5. The government appealed, and the court of appeals again reversed and remanded for further proceedings. Pet. App. 1-52. After reiterating that "the economic impact of the regulation on the claimant" (*id.* at 10) is one of the factors that must be considered in determining whether a regulatory taking has occurred, the court found that the Court of Federal Claims erred by excluding from its analysis the value that petitioner's land could have commanded in the real estate market. *Id.* at 11-17. The court noted that "an assessor might be justified * * * [in] discarding aberrational values based upon sales between related entities or fraudulent sales to widows and orphans," but he "may not discard an *entire* market as aberrational," since "[t]he fact that many players in the market chose to disregard the immediate potential for development in favor of a longterm perspective—hardly unusual behavior in Florida's history of real estate investment—does not make the market as a whole 'aberrational.'" *Id.* at 16-17.

The court of appeals also explained (Pet. App. 13-14 & n.12) that the trial court misread the opinion rendered on the initial appeal as requiring a detailed inquiry into the

actual sophistication of market participants. It is usually appropriate, the court held, to presume that purchasers who engage in arms-length transactions have informed themselves of such legal restrictions as bear on their assessments of value. *Id.* at 14 n.12. As the court further explained, the important point is that petitioner could sell the subject property for substantial value (*id.* at 17):

> It was error to * * * requir[e] a detailed inquiry into the motivation and sophistication of the buyers of comparable parcels. Dollars are fungible; a speculative market provides a landowner with monetary compensation which is just as satisfactory as that provided by any other market. Should a landowner wish to pick and choose her buyers, that luxury is not chargeable to the federal fisc. To conclude otherwise would be tantamount to concluding that there could never be a market fueled by speculation—a conclusion at odds both with common sense and with our directions in [our previous opinion].

Finally, the court noted that the record "suggest[ed]" that petitioner's land has lost *some* value "as a result of the regulatory imposition,"[3] and directed the Court of Federal Claims to determine whether that diminution amounts to a "partial taking." Pet. App. 18-19, 25. Quoting from this Court's opinion in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922), the court noted that the controlling question, as in every regulatory taking case, is whether the regulation at issue "goes 'too

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[3] The court made clear that it will be open to the Court of Federal Claims, in its discretion, to take additional evidence on that question on remand. Pet. App. 18-19 & n.15.

far'" (Pet. App. 19-20, 24) in light of the functions of the regulation, any benefits petitioner and its property may have derived from it, and other *ad hoc* factors traditionally considered by this Court's taking cases. *Id.* at 25-28. As the court of appeals put it, "[w]hat is necessary is a classic exercise of judicial balancing of competing values." *Id.* at 26.

Chief Judge Nies dissented. Pet. App. 32-52. She noted that petitioner had twice tried its case on the theory that the denial of its permit application amounted to a taking of its entire fee interest, and argued that petitioner should not now be given yet another opportunity to retry the case on a new "partial takings" theory. *Id.* at 34-36. Judge Nies also criticized the majority's "partial takings" discussion on the ground, among others, that it unduly focused on a single strand of the landowner's entire bundle of rights, rather than considering the taking question with due attention to the entire spectrum and extent of the landowner's interests. *Id.* at 47-50.

ARGUMENT

The court of appeals did not decide whether the facts of this case constitute a taking. The court of appeals merely ruled that the trial court committed a legal error in concluding that a taking had occurred, and it remanded for application of the correct legal standard and for any further evidentiary proceedings that the trial court may find necessary to apply that standard. The court of appeals was clearly correct to reject the trial court's reasoning, and there is no reason for interlocutory review of the case by this Court.

1. As the court of appeals correctly recognized, this Court's decisions establish an ad hoc approach to deciding whether regulations affecting property con-

stitute a taking and provide that one of the elements which has "particular significance" in making such determinations is the "economic impact of the regulation on the claimant." *Concrete Pipe & Prods. of California, Inc.* v. *Construction Laborers Pension Trust for Southern California*, 113 S. Ct. 2264, 2290 (1993); *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-225 (1986); *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978). Thus, this Court's "test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property." *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 497 (1987). See also *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594 (1962).

Petitioner contends (Pet. 9-14) that a comparison of the pre-regulatory and post-regulatory values of the affected property plays no role in takings analysis where, as a result of the regulation, there is no economic "use" to which the subject land can be devoted. Petitioner's argument, however, overlooks the fact that sale of the property for substantial value constitutes an economic "use" of that property. Indeed, neither this Court's cases nor common sense requires takings analysis to isolate restrictions on the use of land from whatever effect those restrictions may have upon the land's value. As the court of appeals aptly noted (Pet. App. 17), petitioner is not entitled to claim that its land lost all economic value as a result of government regulation when post-regulation arms-length transactions demonstrate that petitioner could have sold the property for a substantial sum. Nor is petitioner entitled to obtain government funds simply by deprecating those willing to pay substantial sums for its property in arms-length transactions as "unknowing speculator[s]"

(Pet. 10), since petitioner's desire "to pick and choose [its] buyers" is a "luxury [that is] not chargeable to the federal fisc." Pet. App. 17.[4]

Nothing in *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), supports petitioner's novel takings theory. See Pet. 12. *Lucas* addressed a situation where the governmental restriction had deprived the subject tract of all of its economic use *and* all of its economic value as well. This Court expressly treated the deprivation of economic value as a key component of the takings analysis. See *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. at 2889 ("This case requires us to decide whether the [regulatory restriction's] dramatic effect *on the economic value* of Lucas's lots accomplished a taking of private property * * * requiring the payment of 'just compensation'") (emphasis added); see also *id.* at 2896 (noting that the regulation rendered the two parcels at issue "valueless"). *Lucas* therefore casts no doubt on the correctness of the court of appeals' conclusion that the post-regulatory value of petitioner's property is an indispensable element of the takings calculus.

2. Petitioner asserts (Pet. 9) that the decision below "is likely to create confusion in the area of regulatory taking law," because the court of appeals "embark[ed] on a new and uncharted course by holding that 'partial takings' are compensable at a rate less than the value of the fee." We agree that the court's references to "partial

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[4] Petitioner is wrong to argue that the court of appeals' analysis "would eviscerate the Fifth Amendment[]," because there always will be speculators willing to gamble that regulatory restrictions will be lifted. Pet. 10. The court of appeals did not hold that the existence of a market based on speculation completely forecloses a takings claim. It simply held that it is *relevant* to the inquiry to know how much money arms-length purchasers would be willing to pay for the regulated property.

takings" are unfortunate and that, if misread, they could create confusion.[5] In particular, to the extent the court's opinion is read as suggesting that regulations that result in a partial diminution of economic value should be equated with a governmentally compelled physical occupation of a portion of a landholding (see Pet. App. 22-23), that suggestion would be wrong.[6]

As we have indicated, however, the bulk of the court of appeals' discussion of the proceedings to be held on remand appears to contemplate that the balancing approach dictated by this Court's cases will be followed. Pet. App. 25-28, 30, 32. Thus, any misunderstanding that might be generated by the court of appeals' opinion may become dissipated when the lower courts ultimately reach a definitive resolution of the takings issue in this proceeding. The mere possibility that such a misunder-

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[5] The term "partial taking" is a misnomer whose use does not promote clarity in regulatory takings cases. As this Court pointed out in *Concrete Pipe*, 113 S. Ct. at 2290:

> [A] claimant's parcel of property [can]not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question.

[6] Unlike regulatory actions, the takings consequence of governmentally compelled permanent physical occupations of land is not dependent on the effect of that occupancy on the balance of the parcel. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) ("[W]hen the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred."). Where no physical occupation is involved, however, the takings analysis will take into consideration the effect of the regulatory imposition on the "parcel as a whole." *Penn Central*, 438 U.S. at 131; see also *Concrete Pipe*, 113 S. Ct. at 2290.

standing might occur is not the type of "extraordinary inconvenience and embarrassment," *American Constr. Co.* v. *Jacksonville, T. & K. Ry.*, 148 U.S. 372, 384 (1893), that should counsel review of this case in its current interlocutory posture.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 94-511

In The

Supreme Court of the United States

October Term, 1994

FLORIDA ROCK INDUSTRIES, INC.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

The government's response fails to distinguish the Court's holding in *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992), from that of the Federal Circuit herein; and misconstrues the Federal Circuit's new partial taking doctrine, underscoring the need for immediate review.

1. Contrary to Respondent's assertion that the Federal Circuit "did not decide whether the facts of this case constitute a taking," (Resp. Br. 8), the Federal Circuit indeed held that Petitioner Florida Rock did not suffer a compensable "categorical taking" (App. 11, 32), because of the possibility of sales to persons without knowledge of the restrictions (App. 14 n.12), despite the fact that the Army Corps of Engineers' denial of a Clean Water Act permit left Florida Rock with no "allowable and practicable immediate use" of its property (App. 111).

The possibility of resale of oceanfront property in *Lucas*, 112 S.Ct. at 2895 n. 8, did not defeat the categorical taking determination where the court found the government had deprived the owner of all economically beneficial use by requiring the land to be left substantially in its natural state. *Lucas*, 112 S.Ct. at 2824-95. Nor should the possibility of the resale of Florida Rock's wetlands, burdened by federal regulations which require it be left in its natural state, enable the government to avoid the payment of just compensation in the instant case.

2. The government suggests that "the court's references to 'partial takings' are unfortunate," and acknowledges that the opinion "could create confusion." (Resp. Br. 10-11). Nevertheless, rather than cross-petitioning, the

government urges that because the Federal Circuit's holding that partial compensation is required "whether the taking is by physical occupation . . . or by regulatory imposition to preserve the property as a wetland" (App. 22-23) is "wrong," (Resp. Br. at 11), review by this court is not required.

The government insists that any "misunderstanding that might be generated by the [Federal Circuit's] opinion"[1] may likely later be resolved by lower court decisions. (Resp. Br. at 11.) Clearly such a resolution has not emerged during the period since publication of the opinion. Thus far, contrary to the government's view, the courts and commentators discussing the Federal Circuit's *Florida Rock* opinion, have consistently interpreted it as permitting compensation under the Fifth Amendment for a regulatory deprivation of less than all economic use.[2]

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[1] Pursuant to the Tucker Act, 28 U.S.C. § 149, the Federal Circuit is, of course, the appellate court to hear all appeals involving claims seeking "compensation for any taking that may occur through the operation of a federal statute." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121,128 (1985).

[2] *See Creppel v. United States*, No. 94-5070, 1994 WL 647932, at *3 (Fed.Cir. 1994); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1180-82 (Fed.Cir. 1994); *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1573-79 (Fed.Cir. 1994) (Nies, C.J., dissenting) (App. 32-50); *Bowles v. United States*, 31 Fed.Cl. 37, 45 (1994); John J. Delaney and Emily J. Vaias, American Law Institute, ALI-ABA Course of Study, "Land Use Institute: Planning, Regulation, Litigation, Eminent Domain, and Compensation; A Survey of Selected Recent Cases" (Aug. 17, 1994), *available in* Westlaw, C930 ALI-ABA 23, 38-40; Michael M. Berger, American Law Institute, ALI-ABA Course of Study, "Land Use Institute: Planning, Regulation, Litigation, Eminent Domain, and Compensation; Recent Takings and Eminent Domain Cases" (Aug.

Such acknowledged confusion on a constitutional issue of first impression demonstrates the necessity for this court's review.

Respectfully submitted,

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17, 1994), *available in*, Westlaw, C930 ALI-ABA 221, 233-38; John L. Horwich and Hertha L. Lund, *Montana Supreme Court Unnecessarily Misconstrues Takings Law*, 55 Mont.L.Rev. 455 (Summer, 1994); Ronald L. Weaver and Mark D. Solov, *Emerging Property Rights Protection*, Fla.Bar J. (June, 1994), *available in* Westlaw, 68 Jun FLBJ 103.